(24,330)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 218.

THE CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHAMPION S. ANDERSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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1 STATE OF INDIANA:

In the Supreme Court.

Be it remembered that heretofore to-wit: On the 3rd day of February, 1913, the same being the 61st Judicial Day of the November Term, 1912 of said Supreme Court, the Chicago, Terre Haute, and Southeastern Railway Company, by its Attorneys Lamb, Beasley, Douthitt & Crawford and William F. Peters, filed in the office of the Clerk of the Supreme Court of said State of Indiana a transcript of the record and proceedings had in the Sullivan Circuit Court of said State of Indiana in a cause wherein the Chicago, Terre Haute and Southeastern Railway Company was the Appellant, and Champion S. Anderson was the Appellee, together with an assignment of errors, in term and bond, which said transcript is in the words and figures following, to-wit:

Sullivan Circuit Court.

2 No. 22340.

CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY COMPANY
vs.
CHAMPION S. ANDERSON.

3 STATE OF INDIANA:

In the Supreme Court.

CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY COMPANY, Appellant,
vs.
CHAMPION S. ANDERSON, Appellee.

Appeal from the Sullivan Circuit Court.

William H. Bridwell, Sole Judge.

Lamb, Beasley, Douthitt & Crawford, Attorneys for Appellant.
Fred F. Bays, and Hunt & Gambill, Attorneys for Appellee.

Filed, Feb. 3, 1913. J. Fred France, Clerk.

4 STATE OF INDIANA:

In the Sullivan Circuit Court.

No. 14819.

CHAMPION S. ANDERSON
vs.
CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY COMPANY.

Appearances:

Fred F. Bays, and Hunt & Gambill, Attorney- for Plaintiff.
Lamb, Beasley, Douthitt & Crawford, Attorneys for Defendant.

Filed Feb. 3, 1913. J. Fred France, Clerk.

5 Pleas and Proceedings before the Honorable William H. Bridwell, Judge of the Fourteenth Judicial Circuit of the State of Indiana and ex officio Judge of the Sullivan Circuit Court, at the November Term, 1911, of said Court, held at the Court House, in the City of Sullivan, in Sullivan County, Indiana, commencing on Monday, the Twenty Seventh day of November, in the Year of Our Lord One Thousand Nine Hundred and Eleven.

STATE OF INDIANA,
County of Sullivan, ss:

In the Sullivan Circuit Court, November Term, 1911.

CHAMPION S. ANDERSON
vs.
CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY COMPANY.

Transcript on Appeal from Justice of Peace Filed.

Be it remembered that heretofore to-wit: On the 13" day of November, 1911, there was filed in the office of the Clerk of said Sullivan Circuit Court, the following transcript in said cause on appeal from Robert Calvert, a Justice of the Peace in and for Hamilton Township, County and State aforesaid, which transcript is in the words and figures as follows, to wit:

6 *Transcript on Appeal from Justice of Peace.*

STATE OF INDIANA,
Sullivan County, ss:

Before Esq. Robert Calvert, in and for Hamilton Township.

CHAMPION S. ANDERSON
vs.
CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY.

Be it remembered, That on the 13 day of November 1911 before the undersigned, Robert Calvert, a Justice of the Peace, within and for Hamilton Township, in Sullivan County, Indiana, the following proceedings were had in the above cause, to-wit:

On October 6, 1911 Fred F. Bays Attorney for the Plaintiff filed in my office, the following Complaint to-wit: (here insert the complaint). Also Champion S. Anderson filed his bond as surety for all costs, should he maintain this action (here insert the bond) Whereupon I issued a summons under my hand and seal, and delivered it to O. R. Rich Constable, to summons, Chicago, Terre Haute and Southeastern Railway Company to appear at my office before me in Hamilton Township on the 13 day of October 1911, at 10 o'clock, A. M. to answer to said complaint.

Received said writ October 6th 1911, served October 7th 1911, by reading the same and in hearing of L. O. Neal Station Agent of the within named, at Sullivan Indiana, Costs $1.05, O. R. Rich Constable (here insert the summons). Oct. 11, 1911 Under my hand and seal I issued a su-pœna for the plaintiff to O. R. Rich Constable, Received said writ Oct. 11, 1911, and served the same by reading to and within the hearing of same, and be leaving copies of same of the rest at the last places of residences. Costs $2.70, O. R. Rich Constable. October 13, 1911, At 10 o'clock. Come now the parties to this cause. This cause is submitted to the
7 Court for trial. The Court being adviseed finds for the plaintiff in the sum of Twenty five ($25.00) dollars, Statutory limit, and the plaintiff shall recover his costs taxed at Twelve 85/100 ($12.85) dollars of the said defendant.

Judgment by Justice of Peace.

Therefore be it ordered, adjudged and decreed, that the plaintiff shall recover of the defendant the sum of Twenty five ($25.00) dollars, and the costs of this action taxed at Twelve 85/100 ($12.85) dollars and all other proper relief.

ROBERT CALVERT, *J. P.*

The following witnesses claimed their fees and mileage for attendance, at said trial, to-wit:

Edward Richardson, Fee $1.00 mileage 70¢ total $1.70
Roy Bolinger, Fee $1.00 mileage 70¢ total $1.70
Ira Anderson, Fee $1.00 mileage 70¢ total $1.70

This 13th day of October, 1911.

ROBERT CALVERT, *J. P.*

Appeal Bond Filed with Justice of Peace.

On this the 11th of November 1911, comes now the defendant Chicago, Terre Haute and Southeastern Railway Company by its Attorneys Lamb, Beasley, Douthit and Crawford, files an appeal bond, to-wit: (here insert appeal bond).

The Costs are as follows:

Edward Richardson witness fee $1.00 mileage 70¢ total	1.70
Roy Bolinger witness fee $1.00 mileage 70¢ total	$1.70
Ira Anderson witness fee $1.00 mileage 70¢ total	$1.70
O. R. Rich Constable total fees.....	4.25
Robert Calvert Docket fee.....	.50
Robert Calvert J. P. fees.....	3.00
Robert Calvert J. P. Appeal Bond and Transcript.....	1.75
Total Costs.....	$14.60

STATE OF INDIANA,
Sullivan County, ss:

I, Robert Calvert, a Justice of the Peace, within and for Hamilton Township, County of Sullivan, in the State of Indiana, do hereby certify that the foregoing is a true and complete copy of the proceedings and judgment had before me in the above entitled cause, *in* the day and year aforesaid, as appears of record in
8 my office:

In testimony whereof, I hereunto subscribe my name and hereto affix my seal at my office at Sullivan, Hamilton Township, Sullivan County, Indiana, this 13 day of November, A. D. 1911.

ROBERT CALVERT,
Justice of the Peace.

Indorsed: No. 14819. Justice of Peace Transcript No. —. Parties, Champion S. Anderson vs. Chicago, Terre Haute and Southeastern Railway Company. Filed Nov. 13, 1911. Arthur E. De Baun, Clerk, Sullivan Cir. Court.

Plaintiff's Complaint.

And along with said Transcript on said date, there was filed in said Clerk's office from said Court the following complaint in said cause, to-wit:

STATE OF INDIANA,
Sullivan County, ss:

Before Robert Calvert, Justice of the Peace of Hamilton Tp.

CHAMPION S. ANDERSON
vs.
CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY.

Complaint.

The plaintiff, Champion S. Anderson, complains of the defendant, Chicago, Terre Haute and Southeastern Railway Company, and says: that the defendant is a railroad corporation doing business in this state, and that one of the branches of the defendant's railway lines intersects the farm of this plaintiff and runs through said plaintiff's land for a distance of one-quarter of a mile in the township of Curry, Sullivan County, Indiana, and that the said defendant refused and neglected between the first day of July, 1911, to the 20th day of August, 1911, to cause all thistles, burrs, docks and other noxious weeds growing on lands occupied by them in the Township of Curry, Sullivan County, Indiana, to be cut down and destroyed, and especially on defendant's said lands running through the lands of this plaintiff. The plaintiff thereby feels him-
9 self aggrieved and says that by reason of the failure and neglect of the said defendant as aforesaid, that he has been damaged in the sum of Twenty Five ($25.00) Dollars and should receive the statutory penalty of Twenty Five ($25.00) Dollars.

FRED F. BAYS,
Attorney for Plaintiff.

Indorsed: No. 14819. State of Indiana, Sullivan County. Champion S. Anderson vs. Chicago, Terre Haute and Southeastern Railway Company. Complaint. Filed Oct. 6, 1911. Robert Calvert, J. P. Filed Nov. 13, 1911. Arthur E. De Baun, Clerk, Sullivan Cir. Court. Fred F. Bays, Att'y for Pl'ff.

Bond and Undertaking of Plaintiff.

And along with said Transcript on said date, there was filed in said Clerk's office from said Court the following cost bond in said cause to-wit:

STATE OF INDIANA,
Sullivan County, ss:

Whereas, I, Champion S. Anderson, have filed suit against the Chicago, Terre Haute and Eastern Railway Company for statutory penalty of Twenty Five Dollars for defendant's failure to cut down and destroy all noxious weeds growing on defendant's land in Curry Township, Sullivan County, Indiana, I hereby acknowledge myself

as surety for all costs that may be incurred in the prosecution of said suit should I fail to maintain this action.

CHAMPION S. ANDERSON.

Subscribed and sworn to before me this 6" day of October, 1911.

ROBERT CALVERT,
Justice of the Peace of Hamilton Township.

Approved by me.

ROBERT CALVERT, *J. P.*

Indorsed: No. 14819. State of Indiana, Sullivan County. Anderson vs. Chicago, Terre Haute and South Eastern Railway Company. Bond. Filed Oct. 6, 1911. Robert Calvert, J. P. Filed Nov. 13, 1911. Arthur E. De Baun, Clerk, Sullivan Cir. Court.

And along with said Transcript on said date there was filed in said Clerk's office from said Court the following summons in said cause, to-wit:

Summons.

STATE OF INDIANA,
Sullivan County, ss:

To Any Constable of said County:

You are hereby commanded to summons Chicago, Terre Haute and South Eastern Railway Company to appear — me at my office in Hamilton Township on the 13 day of October, 1911, at 10 o'clock A. M., to answer Champion Anderson in a complaint wherein he claims the sum of Twenty Five dollars as damages and returns this writ then and there.

Witness my hand and official seal this the 6 day of October, 1911.

ROBERT CALVERT, *J. P.*

Indorsed: No. 14819. Champion S. Anderson, plaintiff, versus Chicago, Terre Haute and South Eastern Railway Company, defendants. Demands $—. Received this 6 day of October, 1911; served the 7 day of October, 1911, by reading the same to and within hearing of the within named Austin L. O. Neill, Station agent for the Chicago, Terre Haute and South Eastern Railway Company. O. R. Rich, Constable served the 7 day of October, 1911. Filed Nov. 13, 1911. Arthur E. De Baun, Clerk, Sullivan Cir. Court. Austin L. O. Neill.

Appeal Bond as Filed with Justice of Peace.

And along with said Transcript on said date, there was filed in said Clerk's office from said Court the following Appeal Bond in said Cause, to-wit:

STATE OF INDIANA,
Sullivan County, ss:

Before Robert Calvert, J. P., Hamilton Township.

CHAMPION S. ANDERSON
vs.
CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY.

Appeal Bond.

We, Chicago, Terre Haute and Southeastern Railway Company, and Charles A. Beasley, acknowledge ourselves bound to Champion S. Anderson in the penal sum of One Hundred ($100.00) Dollars.

Witness our hands and seals this 11th day of November, 1911.

Whereas said Champion S. Anderson within thirty days last passed obtained judgment against Chicago, Terre Haute and
11 Southeastern Railway Company before Robert Calvert, Justice, for twenty-five dollars with costs tax- at Twelve and 85/100 ($12.85) Dollars and said Chicago, Terre Haute and Southeastern Railway Company has appealed therefrom.

Now, if said Chicago, Terre Haute and Southeastern Railway Company shall prosecute its appeal to final judgment and pay such judgment as may be rendered against it on such appeal, this bond shall be void; else in full force.

CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY COMPANY,
By LAMB, BEASLEY, DOUTHITT & CRAWFORD,
Its Attorneys.

[SEAL.] CHAS. A. BEASLEY. [SEAL.]

Taken and approved by me this 11th day of November, 1911.

ROBERT CALVERT,
Justice of the Peace.

Filed at my office on the 11 day of November 1911.

ROBERT CALVERT,
Jusitce of the Peace.

Indorsed: No. 14819. Filed Nov. 13 1911. Robert E. De Baun, Clerk Sullivan Circ. Court.

And afterwards to-wit: On the 27″ day of November 1911, the same being 1″ Judicial Day of said November Term 1911 of said Court, held at the time and place and before the Honorable Judge aforesaid the following proceedings were had in said cause, to-wit:

Motion to Make Complaint More Specific.

Comes now the Plaintiff herein by Attorneys Fred F. Bays and Lee F. Bays and comes also the defendant by Attorneys Lamb, Beasley, Douthitt and Crawford into open court and defendant files * * * motion to make complaint more specific which motion is in the words and figures as follows, to-wit:

STATE OF INDIANA,
County of Sullivan, ss:

In the Sullivan Circuit Court, November Term, 1911.

CHAMPION S. ANDERSON
vs.
CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY COMPANY.

12 Comes now the defendant and moves the court to require the plaintiff to make his complaint more specific in the following:

That the plaintiff set out in detail the particular facts resulting from the alleged failure to mow defendant's right of way by reason of which he feels himself aggri-ved as charged in his complaint.

LAMB, BEASLEY, DOUTHITT & CRAWFORD,
Attorneys for Defendant.

Indorsed: No. 14819. Sullivan Circuit Court. Champion S. Anderson vs. Chicago, Terre Haute and South Eastern Ry. Co. Motion to make complaint more specific. Filed Nov. 27" 1911. Arthur E. De Baun, Clerk Sullivan Cir. Court. Lamb, Beasley, Douthitt & Crawford, Attorneys for Def't.

And afterward to-wit: on the 22" day of February 1912, the same being the 4" Judicial Day of the February Term 1912, of said Court, begun and held and continued at the Court House in Sullivan Indiana, commencing on Monday the 19" day of February 1912, before the Honorable Judge aforesaid the following further proceedings were had in said cause, to-wit:

Motion to Make Complaint More Specific Overruled and Defendant Excepts.

Come now *and* again the parties herein by Attorneys aforesaid into open Court, * * * and motion to make complaint more specific is overruled and defendant excepts.

And afterward to wit: On the 6" day of May 1912, the same being the 1" Judicial Day of the May Term 1912 of said Court begun held and continued at the Court House in Sullivan, Indiana, commencing on Monday the 6" day of May 1912, before the Honorable

Judge aforesaid, the following further proceedings were had in said cause, to-wit:

Come now the parties herein by Attorneys aforesaid into open Court and * * *.

And afterward to-wit: On the 10" day June 1912, the same
13 being the 31" Judicial Day of said May Term 1912 of said Court, held at the time and place before the Honorable Judge aforesaid the following further proceedings were had in said cause, to-wit:

Defendant Granted Leave to File Demurrer and Plaintiff's Exception.

Come now again the parties herein by attorneys aforesaid into open Court and defendants ask- leave to file demurrer to complaint and the plaintiff objects. And objection is by the Court overruled and excepts.

And now said demurrer to complaint is filed, which is in the words and figures as follows, to-wit:

Demurrer Filed.

STATE OF INDIANA,
County of Sullivan, ss:

In the Sullivan Circuit Court, May Term, 1911.

CHAMPION S. ANDERSON
vs.
CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY COMPANY.

The defendant in the above entitled cause demurrers to the plaintiff's complaint herein and for ground for demurrer says; that plaintiff's complaint herein does not state facts sufficient to constitute a cause of action against this defendant.

LAMB, BEASLEY, DOUTHITT AND CRAWFORD,
Attorneys for Defendant.

Memorandum Filed with Demurrer to Complaint.

Memorandum filed with demurrer showing wherein plaintiff's complaint is insufficient for want of facts.

"1. The complaint fails to show by sufficient averment of facts that plaintiff suffered any real *are* substantial injury by reason of the facts alleged.

2. The materrial allegations of the complaint and each of them are not by direct averment but are by way of recital only.

3. The court approved March 6" 1889, entitled "An act concerning the cutting and destroying of thistles, burrs, docks and other noxious weeds by railroad corporations, Acts 1889 page 146, and

being Section 5524 and 5525, Burns' R. S. 1908, and each section thereof is unconstitutional.

4. The complaint fails to show by sufficient averment a
14 state of facts disclosing a duty on the part of the Railway Company to cause all thistles, burr, docks and other noxious weeds to be cut down and destroyed at the time and in the manner alleged in the complaint.

5. The complaint fails to show by sufficient averment of facts directly alleged that there existed such relation between the plaintiff and the defendant railway company as to impose any legal duty on the defendant by virtue of the aforesaid act of March 6" 1889.

6. The complaint does not disclose by averment of facts directly alleged that the defendant violated any of the provisions of the act of March 6" 1889.

7. The complaint does not show by direct averment such state of facts as disclosed a legal duty owing by defendant to the plaintiff by reason of common law statute or otherwise.

8. The complaint is not sufficient either in substance or form to entitle plaintiff to recover in this action.

LAMB, BEASLEY, DOUTHITT AND CRAWFORD,
Attorneys for Defendant.

Indorsed: No. 14819. Sullivan Circuit Court. Champion S. Anderson vs. Chicago, Terre Haute and Southeastern Railway Company. Demurrer to complaint. Filed June 10 1912. Charles R. Railsback, Clerk Sullivan Cir. Court. Lamb, Beasley, Douthitt and Crawford, Attorneys for Defendant.

Demurrer Overruled. Defendant's Exception.

And plaintiff excepts and demurrer to complaint is overruled by the Court and defendants except- and file- answer in general denial, which answer is in the words and figures as follows, to-wit:

Answer in General Denial.

STATE OF INDIANA,
County of Sullivan, ss:

In the Sullivan Circuit Court, May Term, 1912.

CHAMPION S. ANDERSON
vs.
CHICAGO, TERRE HAUTE & S. E. RY. CO.

Answer.

15 Trial by Court.

Comes now the defendant and for answer to plaintiff's complaint herein denies each and every allegation therein contained.

LAMB, BEASLEY, DOUTHITT AND CRAWFORD,
Attorneys for Defendant.

Indorsed: No. 14919. Sullivan Circuit Court. Champion S. Anderson vs. Chicago, Terre Haute and Southeastern Railway. Answer Gen. Denial. Filed June 10 1912. Charles R. Railsback, Clerk Sullivan Cir. Court. Lamb, Beasley, Douthitt & C—, Att'ys for Def't.

And this cause being now at issue upon said answer the same is submitted to the Court for trial, finding and judgment without the intervention of a jury.

And the Court having heard all the evidence now takes this cause under advisement.

And afterward to-wit: on the 22" day of June 1912, the same being the 42 Judicial day of said May Term 1912 of said Court, held at the time and place and before the Honorable Judge aforesaid the following further proceedings were had in said cause, to-wit:

Finding by Court for Plaintiff.

Come now again the parties herein by Attorneys aforesaid into open Court and the Court having had this cause under advisement now finds for the plaintiff in the sum of $25.00.

And the defendant files motions and reasons for a new trial, which motion and reasons are in the words and figures as follows, to-wit:

Motion and Reasons for a New Trial.

STATE OF INDIANA,
County of Sullivan, ss:

In the Sullivan Circuit Court, September Term, 1912.

CHAMPION S. ANDERSON
vs.
CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY.

The defendant moves the Court to grant a new trial in the above entitled cause for the following causes, to-wit:

1. Because the Court erred in permitting plaintiff's witness,
16 Champion S. Anderson, over the objection — defendant's Counsel to answer the following question propounded to him on direct examination, to-wit:

"You may state to the Court if you saw that railroad track and the right of way that runs through your farm there in July and up to the 20" of August, 1911."

To which the witness answered "Yes".

2. Because the Court erred in permitting Champion S. Anderson, while a witness in his own behalf to answer the following question on direct examination over the objection of defendant's Counsel:

"You may state to the Court what, if anything, was growing on that right of way in July and up to the 20" of August.

To which the witness responded: "Weeds."

3. Because the Court erred in permitting Roy Bolinger a witness called in behalf of plaintiff to answer the following question over the objection of defendant's counsel, propounded to him by plaintiff's counsel on direct examination, to-wit:

"I will ask you to tell the Court what growth was growing on the right of way of the Chicago, Terre Haute and Southeastern Railway Company through and on Champion S. Anderson's land in Curry Township, Sullivan County, Indiana, in the month of July and up to the 20" of August, 1911, if anything?"

To which question the witness responded: "Dock, briars, rag weed, and smart weed, a kind of nettle and mullen weed."

4. Because the Court erred in permitting Edward Richardson a witness in plaintiff's behalf to testify upon direct examination over the objection of defendant's counsel in answer to the following question propounded to him, to-wit:

"You may state to the Court, what, if any, growth you saw growing on that right of way in the months of July and August 1911?"

To which the witness answered: "I saw lots of growths".

17 *Defendant's Exception.*

5. The damages are excessive.
6. The finding of the Court is not sustained by sufficient evidence.
7. The finding of the Court is contrary to law.

LAMB, BEASLEY, DOUTHITT & CRAWFORD,
Attorneys for Defendant.

Indorsed: No. 14819. Sullivan Circuit Court. Champion S. Anderson vs. Chicago, Terre Haute and Southeastern Railway Co. Defendant's Motion and reasons for a new trial. Filed June 22" 1912. Charles R. Railsback, Clerk Sullivan Circuit Court. Lamb, Beasley, Douthitt & C., Att'ys for Def't.

And afterward to-wit: On the 9" Judicial day of the September Term 1912, of said Court, begun, held and continued at the Court House, in Sullivan, Indiana, commencing on Monday the 2" day of September 1912, before the Honorable Judge aforesaid the following further proceedings were had in said cause, to-wit:

Motion for a New Trial Overruled. Ninety Days for Bill of Exceptions.

Come now again the parties herein by Attorneys aforesaid into open Court and motion for a new trial, heretofore filed, is overruled and defendant excepts and is given 90 days to file bill of exceptions.

And defendant now files motion in arrest of judgment, which is in the words and figures as follows, to-wit:

STATE OF INDIANA,
County of Sullivan, ss:

In the Sullivan Circuit Court, September Term, 1912.

CHAMPION S. ANDERSON
vs.
CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY.

Motion in Arrest of Judgment.

Comes now the defendant and moves the Court in Arrest of any Judgment or decree in favor of plaintiff in this cause on the following grounds to-wit:

1. The complaint does not state facts sufficient to constitute a cause of action.

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2. The complaint fails to show that the plaintiff suffered any real or substantial injury.

3. There is a total failure to show that plaintiff suffered any substantial injury which would support the finding of the Court herein.

4. The act approved March 6th 1889, entitled, "An act concerning the cutting and destroying of thistles, burrs, dock and other noxious weeds by railroad corporations," Acts 1889 p. 146, and being Section- 5524 and 5525 Burns' R. S. 1908 and each section thereof is unconstitutional.

LAMB, BEASLEY, DOUTHITT AND CRAWFORD,
Attorneys for Defendant.

Indorsed: No. 14819. Sullivan Circuit Court. Champion S. —— vs. Chicago, Terre Haute and Southeastern Ry. Co. Motion in Arrest of Judgment. Filed Sep. 9, 1912. Charles R. Railsback, Clerk Sullivan Cir. Court. Lamb, Beasley, Douthitt and Crawford, Att'ys for Def't.

Motion in Arrest of Judgment Overruled. Defendant Excepts.

And the Court having heard said motion now overrules the same and defendant excepts.

Judgment. Appeal Prayed. Appeal Granted. Sureties Tendered and Approved.

It is therefore ordered, adjudged and decreed by the Court on finding that the defendant take nothing by this action and that plaintiff recover of and from the defendant the sum — Twenty Five ($25.00) Dollars together with the costs of this action laid out and expended taxed at $—.

And defendant excepts and prays an appeal to the Supreme Court. And the Court having heard such prayer, now grants the same and bond fixed in the sum of $100.00 and Josh Beasley and Chas. A. Beasley are tendered as sureties who are approved and 90 days are given to file bond.

And afterward to-wit: On the 6" day of December 1912, the same being the 11" Judicial day of the November Term 1912 of said Court, begun, held and continued at the Court House in Sullivan, Indiana, commencing on Monday the 25" day of November 1912, before the Honorable Judge aforesaid, the following further
19 proceedings were had in said cause, to-wit:

Bill of Exceptions Filed. Entry Showing Filing of Bill of Exceptions.

Comes now the defendant, Chicago, Terre Haute and Southeastern Railway Company, and files in open Court its bills of exceptions containing all of the evidence given in said cause, which said bill of exceptions was on the 4" day of December 1912 prior to the filing of the same duly allowed and signed by the Judge of this Court.

It is ordered, considered, adjudged and decreed by the Court that said bill of exceptions so allowed and signed by the Judge, be and the same is hereby made a part of the record in this cause. Said original bill of exceptions is in the words and figures as follows, to-wit:

20 *Original Bill of Exceptions.*

STATE OF INDIANA,
County of Sullivan, ss:

In the Sullivan Circuit Court, November Term, 1912.

No. 14819.

CHAMPION S. ANDERSON
vs.
CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY COMPANY.

Defendant's General Bill of Exceptions Containing the Evidence in said Cause.

Filed Dec. 6, 1912. Charles R. Railsback, Clerk Sullivan Cir. Court.

21 STATE OF INDIANA,
County of Sullivan, ss:

In the Sullivan Circuit Court, May Term, 1912.

Honorable William H. Bridwell, Sole Judge.

No. 14819.

CHAMPION S. ANDERSON
vs.
CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY COMPANY.

Defendant's Bill of Exceptions.

Appearances:

Hunt & Gambill, Attorneys for Plaintiff,
Lamb, Beasley, Douthitt & Crawford, Attorneys for Defendant.

Be it remembered that at the May Term, 1912, of the Sullivan Circuit Court of Sullivan County, held at the court house in the City of Sullivan, Sullivan County, in the State of Indiana, on the 10th day of June, same being the 31st Judicial Day of the May Term of the Sullivan Circuit Court of said Sullivan County, the cause of Champion S. Anderson vs. Chicago, Terre Haute & Southeastern Railway Company being cause No. 14819 in said Sullivan
22 Circuit Court was called for trial before the Honorable William H. Bridwell, sole judge, to try said cause, and the cause being at issue and a jury being waived, trial was had by the court and evidence was offered and introduced in this cause, as hereinafter set out and rulings of the court were had and made in respect to the admission and rejection of evidence, and the competency of the witnesses as hereinafter set out, and objections and exceptions were made and taken by counsel of the parties in this cause to the rulings of the court on the admission and rejection of evidence and the competency of the witnesses as hereinafter set out.

The plaintiff to maintain the issues in his behalf on the trial of said cause, offered and introduced the following evidence in chief:

Filed Dec. 6, 1912. Charles R. Railsback, Clerk Sullivan Cir. Court.

23 *Direct Examination of Champion S. Anderson, Witness for Plaintiff.*

CHAMPION S. ANDERSON, a competent and material witness, being first duly sworn, and on behalf of the plaintiff, testified as follows:

Examined by Mr. CHARLES B. HUNT:

Q. State your name to the jury.
A. Champion S. Anderson.

Q. Where do you live?
A. In Curry Township.
Q. What County and State?
A. Sullivan County, Indiana.
Q. I will ask you if you own real estate up there in that township?
A. I do.
Q. I wish you would tell the Court, where that land is, that you own?
A. Do you mean the section and all that?
Q. Yes; or locate it by some particular thing.
A. It is located just about the edge of the road at Shelburn that crosses from the gravel road that runs into Shelburn and runs through my land a full half mile and nearly to the rock road and comes out about a half a mile to the gravel road.
Q. Does your land lie east of west of the C. E. & I. Railroad?
A. My land is east of the train that goes through Shelburn.
Q. Does it lie north or south of the town of Shelburn?
24 A. It lies a little northeast of Shelburn. It was in sight of Shelburn.
Q. Do you know of a gravel road or rock road that runs east from Currysville?
A. Yes, sir.
Q. Does it lie south of that road?
A. It lies south of that road that goes to Currysville out east.
Q. Does it lie south of it?
A. Yes, sir, right along the edge of it; that road runs along the edge of my land.
Q. How far east of Currysville is your land?
A. I could not tell you exactly.
Q. Now, I will ask you of the Chicago, Terre Haute and Southeastern Railroad Company has a railroad that runs through your land?
A. They did. There is a road runs there right close by me.
Q. What direction does that railroad run through your land?
A. I don't know. It cat-a-corners across my land; it does not go through straight.
Q. I will ask you to tell the Court, if you owned the land, when the railroad was put through there?
A. I did.
Q. You may state to the Court, if the Railroad Company owned a right-of-way on either side of the track through your land?
25 A. Yes, sir, they own one hundred feet, from one fence to the other.
Q. And where is the railroad track that runs through this one hundred feet—in the center of it?
A. The track is in the center of the one hundred feet.
Q. Tell the Court if you were along there and were acquainted with that part of your farm in the month of July and up to the 20th of August, 1911?

To this question, counsel for defendant, objected for the reason it

is a matter outside of the issues of this complaint and does not tend to prove or disprove any allegation in the complaint, and for the further reason it is a matter collateral to the issues as now formed in this action. Which objection was by the Court, overruled. To which ruling of the Court, Counsel for Defendant at the time excepted.

A. I was there *pert ner* every day; it runs along the corner of my orchard.

Q. Now, you may state to the Court if you saw that railroad track and the right-of-way that ran through your farm there in July and up to the 20th of August, 1911?

A. Yes, sir.

Q. You may state to the Court, what, if anything, was
26 growing on that right-of-way in July and up to the 20th of August, 1911:

To which question, Counsel for Defendant, objected for the reason it is a matter outside of the issues of this complaint and does not tend to prove or disprove any allegation in the complaint, and for the further reason it is a matter collateral to the issues as now formed in this action. Which objection was by the Court, overruled. To which ruling of the Court, Counsel for Defendant at the time excepted.

A. Weeds.

Q. What else?

A. I could not tell you all that was there; weeds and things of general growth on the land that is fenced in.

And at this time, Counsel for Defendant, moves the Court that the answer of witness be stricken out as being responsive to the question, and for the further reason that he is enumerating something that is not specified in the complaint. Which motion was by the Court, overruled to which ruling of the Court, Counsel for Defendant at the time excepted.

Q. Can you name the kind of weeds?

A. I ain't acquainted with the names; I used to know more than I do now.

27 Q. Name some of them.

A. Well, growing all along up inside of the road, pert near two feet high——

And at this time, Counsel for Defendant, moves the Court that the answer of witness be stricken from the record, as not being responsive to the question. Which motion was by the Court sustained. To which ruling of the Court, Counsel for Plaintiff, at the time excepted.

Q. What kind of weeds?

A. Maybe the rest of them can tell; I can't see to do any good.

Q. You don't know the kind of weeds?

A. No, I don't; there is weeds there that I don't know what is.

Q. What about thistles growing there?

To which question, Counsel for Defendant, objected for the reason

it is leading and suggestive. Which objection was by the Court sustained. To which ruling of the Court, Counsel for Plaintiff, at the time excepted.

Q. You may state to the Court whether or not you saw any thistles growing on this railroad company's right-of-way, that run- through your farm in Curry Township, Sullivan County, Indiana, in July and up — August 20th, 1911?

A. I don't know that I did.

28 Q. You may state to the Court if you saw any burrs growing on the right-of-way?

A. I think not.

Q. You may state to the Court, if you saw any dock growing on the right-of-way?

To which question, Counsel for Defendant, objected for the reason it is leading and suggestive. Which objection was by the Court, sustained. To which ruling of the Court, Counsel for Plaintiff, at the time excepted.

Q. You may state to the Court whether or not in July and up to 20th of August, 1911, you saw any dock growing on the railroad company's, this defendant's, right-of-way, that runs through your farm, there in Curry Township, Sullivan County, Indiana?

To which question, Counsel for Defendant, objected for the reason it is leading and suggestive and for the further reason that the question assumes the ownership of the right-of-way. Which objection was by the Court overruled. To which ruling of the Court, Counsel for Defendant, at the time excepted.

A. I don't know that I did. I forget, it has been a good while ago; I don't know whether I did or not.

29 Q. You may state to the Court whether or not these weeds that you have testified to, that you saw growing there, on that right-of-way, was cut down and destroyed in the month of July and up to the 20th of August, 1911?

To which question, Counsel for Defendant, objected for the reason that it calls for a matter that is not in issue under this complaint. It has been designated by the witness that he did not see any burrs, dock or thistle and the question calls for the cutting down of other weeds. Which objection was by the Court sustained. To which ruling of the Court, Counsel for Plaintiff, at the time excepted.

Cross-examination.

Cross-examined by Mr. BERT BEASLEY:

Q. How long have you lived on this farm *on* Curry Township?

A. Ever since '67.

Q. When was the railroad built across your farm?

A. I don't know; if I could see to write I could tell you, if I had my books with me.

Q. About when was it constructed?

A. I don't know how many years ago.

Q. As many as ten years ago?
A. I would not say.
Q. As much as fifteen years ago?
A. No, I don't think so.
30 Q. Then it was not as much as fifteen years ago?
A. No.
Q. Have you seen any burr, dock or thistle on your farm?
A. I have, yes sir, and cut them down. I have seen other kind of thistle.
Q. Have you seen dock?
A. Yes sir.
Q. And burrs?
A. And cuckle burrs and all kinds of burrs on my farm now.
Q. And were before the railroad was built?
A. Yes sir, I think there were.
Q. I understand you to say that you didn't know about any burrs?
A. I never went over and up in and around th look for them, because I can't see to tell.
Q. You didn't see any burrs or dock or thistle on the right-of-way of the defendant's railroad in the month of July and up — the 20th of August, 1911, did you?
A. I don't know that I did.
Q. Were there any burrs or dock or thistle on your farm in 1910?

To which question, Counsel for Plaintiff, objected for the reason it is not cross-examination and for the further reason it is outside the issues in the case and wholly immaterial. Which ob-
31 jection was by the Court overruled. To which ruling of the Court, Counsel for Plaintiff, at the time excepted.

A. I think there was.
Q. In the year 1909?
A. I reckon there was. I don't recollect the years.
Q. In 1908?
A. I don't recollect.
Q. Was there any on your farm five years ago?

To which question, Counsel for Plaintiff, objected for the reason it is too remote. Which objection was by the Court, Sustained. To which ruling of the Court, Counsel for Defendant, at the time excepted.

Direct Examination of Roy Bolinger, Witness for Plaintiff.

ROY BOLINGER, a competent and material witness, being first duly sworn upon his oath, and on behalf of the plaintiff, testified as follows:

Examined by Mr. CHARLES D. HUNT:

Q. State your name.
A. Roy Bolinger.
Q. Where do you live?
A. East of Shelburn.

Q. Do you know Champion S. Anderson?
A. Yes sir.
Q. Do you know where his farm is?
A. I do.
32 Q. Do you know where the C. E. & I. right-of-way runs through his farm?
A. I do.
Q. I will ask you if you were acquainted with it in the year 1911, in the month of July and up to the 20th of August, 1911?
A. I was.
Q. I will ask you to tell the Court, what growth was growing on the right-of-way of the Chicago, Terre Haute and Southeastern Railway Company, through and on Champion S. Anderson's land in Curry Township, Sullivan County, Indiana, in the month of July, and up to the 20th day of August, 1911, if anything?

To which question, Counsel for Defendant, objected for the reason it is a matter that would not prove or tend to prove any of the issues in this case and would not prove or tend to prove any allegation in the complaint, and is a matter immaterial under the issues, made by the pleadings, at this time. Which objection was by the court overruled. To which ruling of the Court, Counsel for Defendant, at the time excepted.

A. Dock, briars, rag weeds and smart weeds, and a kind of nettle and mullen plant.

And at this time, Counsel for Defendant, moves the Court, that the answer of witness, with the exception of "dock, burr and
33 thistle," be stricken from the record, as not being responsive to the question. Which motion was by the Court, sustained. To which ruling of the Court, Counsel for Plaintiff, at the time excepted.

Q. Tell the Court, if you know what kind of dock?
A. Curly dock and bitter dock both.
Q. Describe to the Court, how much of that was on the right-of-way, you can state it by feet, by rods, or how much land was covered by that stuff.

To which question, Counsel for Defendant, objected for the reason it is a matter that would not prove or tend to prove any of the issues in this case and would not prove or tend to prove any allegations in the complaint, and is a matter wholly immaterial under the issues made by the pleadings at this time. Which objection was by the Court overruled. To which ruling of the Court, Counsel for Defendant, at the time excepted.

A. I could not say how thick it was; some places it would be tolerable thick and other places not so thick.
Q. These places that were pretty thick; how large were they at that time?
A. Couple of feet square I reckon.
Q. This would continue for what distance along Mr. Anderson's land?

34 A. Most of the way across, I think.

Q. About how far distant of the right-of-way across his land, is it?

A. About a half mile.

Q. With reference to the burrs you spoke of; how thick were they in July and August, 1911?

A. I don't know that I saw any burrs at all right then.

Q. What did you say about the thistles?

A. What kind of thistles?

Q. Any kind.

A. I found several small thistles, or nettles I call them.

Q. How thick were these thistles in July and August, 1911 about how common were they on the right-of-way—about like the dock?

A. They run about like the dock.

Q. Now, I wish you would tell the Court what other growth was on that right-of-way, in July and August, 1911, growing, other than this thistle and dock that you have mentioned.

To which question, Counsel for Defendant, objected for the reason it is a matter that would not prove or tend to prove any of the issues in this case and would not prove or tend to prove any allegation in the complaint, and is a matter wholly immaterial under the issues, made by the pleadings at this time. Which objection was by the Court sustained. To which ruling of the

35 Court, Counsel for Plaintiff, at the time excepted.

Q. Can you now recall any weeds that were growing on the right-of-way?

A. Rag weeds and smart weeds.

Q. For what distance, did these things that you have mentioned, as growth on the right-of-way, extend up and down the right-of-way, along Mr. Anderson's land?

A. Something like forty rods.

Q. With reference to the whole distance of it; did it run through the whole distance, practically?

A. Yes sir, was all the way.

Q. Now, I will ask you if these growths, that you have enumerated, that were existing there on the right-of-way in July and August, 1911, were cut and destroyed in July or August, 1911, or not?

A. They were not.

Q. State whether or not there were trains run over that road, during that time?

A. There were.

Q. I will ask you if this land that you have alluded to here as the defendant's right-of-way, through Mr. Anderson's land, is in Curry Township, Sullivan County, Indiana?

A. It is.

36 Cross-examination.

Cross-examined by Mr. BERT BEASLEY:

Q. Where do you live with reference to the right-of-way that you have been testifying about?

A. My ground comes right up to it on the west side.

Q. What occasion did you have to go over the right-of-way in July and August?

A. It was plain to be seen from either side.

Q. You did not go across the right-of-way that extended to Mr. Anderson's farm?

A. Yes sir, I have been over it.

Q. Did you in the month of July and August?

A. Yes sir.

Q. What was the occasion of your going in July and August?

A. I could not say now; passing backwards and forwards.

Q. How many trips do you think you made in these months, along the right-of-way?

A. Two or three anyway.

Q. Where did you go on one of these occasions?

A. I went to the St. Clair Mine.

Q. That was in the month of July and August?

A. Yes sir.

Q. What was the occasion of your going to the St. Clair Mine?

A. Just went to the coal shaft.

Q. Just out of curiosity?

37 A. I went to the coal office at St. Clair.

Q. What other trips did you make over this right-of-way in July and August, last year?

A. I don't know of any particular trip, just going up and down the track for pasttime.

Q. How many times did you observe the growth on the right of way?

A. Every time I passed along.

Q. How many times was that?

A. Two or three times.

Q. Are you sure that you made the trips along there in July and August, last year?

A. I did.

Q. What part of the right-of-way did you find any thistle on?

A. On each side of the road; just north of the rock road there.

Q. Was that on Mr. Anderson's land?

A. It was on the railroad's.

Q. Was it adjoining Mr. Anderson's land?

A. It was.

Q. What kind of thistle were there?

A. I did not say there were thistle; I call them nettles; they are something like a thistle.

Q. Were there any Canadian thistle there?

A. I could not say what kind there were.

Q. How high did they grow in July and August?
38 A. Twelve inches.
Q. Did they get any higher than that?
A. I don't think they did.
Q. What kind of burrs did you find?
A. I did not find any.
Q. Where else did you find any thistle on the right-of-way, besides north of the rock road in July and August?
A. Extending off and on all along the way, I think.
Q. Are you sure about that?
A. Yes sir.
Q. In a continuous strip?
A. No, scattered all along.
Q. About how many thistles do you think there were in that strip of right-of-way on Mr. Anderson's land?
A. Some places you would find a dozen and then again not so many.
Q. You say you saw some dock?
A. I did.
Q. Where was it?
A. On the right-of-way.
Q. What kind of dock was it?
A. I found some curly dock and some bitter dock.
Q. Have you been acquainted with Mr. Anderson's land for any length of time?
A. Yes sir.
Q. How long have you been acquainted with it?
39 A. Five years.
Q. Did you know the land before the railroad was built across it?
A. I did not.
Q. Have you been on Mr. Anderson's land during that five years that you have known it?
A. Yes sir.
Q. Been across it in various parts of it?
A. Yes sir.
Q. In that five years' time, did you notice any burrs, dock or thistle on his land?
A. I did not.
Q. Are you any relation to Mr. Anderson?
A. No sir.
Q. Were you subpœnaed in this case?
A. I was.
Q. When.
A. Saturday evening.
Q. Who was the officer?
A. Mr. Wible.

Direct Examination of Edward Richardson, Witness for Plaintiff.

EDWARD RICHARDSON, a competent and material witness, being duly sworn and on behalf of the plaintiff, testified as follows:

Examined by Mr. CHARLES D. HUNT:

Q. State your name to the Court.
A. Edward Richardson.
Q. Where do you live?
40 A. Curry Township, Sullivan County, Indiana.
Q. Can you get to it any closer than that?
A. Half mile east of Shelburn.
Q. On the rock road?
A. Yes sir.
Q. Do you know where the defendant's right-of-way is through Mr. Anderson's land?
A. Yes sir.
Q. I will ask you if you were acquainted with that place in July and August, 1911?
A. I was.
Q. You may state to the Court, what, if any, growth you saw growing on that right-of-way in the months of July and August, 1911?

To which question, Counsel for Defendant, objected. Which objection was by the Court, overruled. To which ruling of the Court, Counsel for Defendant, at the time excepted.

A. I saw lots of growths.
Q. What was it?
A. Docks, weeds and thistles and all sorts of things.
Q. How much dock did you see growing there?
A. I don't know; just the natural amount of it that grows.
Q. How was it as to being the entire length of the right-of-way on Mr. Anderson's land?
A. I would not say; mostly on the south part, I suppose.
41 Q. What about the thistle?
A. A good many; could not walk on the side of the railroad.
Q. Why not?
A. Could not get along.
Q. Why not?
A. Because of the thistle and weeds growing up in the middle of the track.
Q. What kind of weeds?
A. Rag weed, white top and smart weed.
Q. You may state to the Court whether or not you saw any burrs growing on the right-of-way?
A. There was sand burr.
Q. How much sand burr did you see growing on the right of way?

A. I don't know; all along the side of the track. You would get them all over you, if you walked — the side of the track.

Q. State how they were with reference to extending the entire length of the right-of-way on Mr. Anderson's land?

A. They might not have went clear through.

Q. Tell the Court how much there was?

A. A good many on the track. I could not say just how many there would be.

Q. You may state to the Court whether or not these growths that you have enumerated, were cut and destroyed in the month of July and August, 1911?

42 A. They was not.

Q. You may state whether the burrs were cut in the month of July and August, 1911?

A. No sir, they were not.

Q. And whether or not the thistle was cut in the months of July and August, 1911?

A. They was not.

Q. State to the Court, whether or not the dock was cut in the months of July or August, 1911?

A. No sir.

Cross-examination.

Cross-examined by Mr. BERT BEASLEY:.

Q. Where do you live with reference to the right-of-way?

A. I live right up to, on the east side of the track.

Q. Where do you live with reference to Roy Bolinger?

A. Right across the railroad—east.

Q. Did you say you were frequently up and down the right-of-way?

A. Every day.

Q. What was your business?

A. I went to my work along that railroad.

Q. Where was your work?

A. At the St. Clair Mine.

Q. Did you live on the road that is on the south side of Mr. Anderson's land?

A. I live on the southwest corner of his land.

43 Q. And your going to the St. Clair mine, required you to pass across Mr. Anderson's land to the northeast?

A. Yes sir, went in at one end and out the other.

Q. Did you see anything of sand burrs in the month of June, 1911?

A. Yes sir, pulled them off of me many a time.

Q. In the month of June?

A. I guess it was June; they were ripe.

Q. Were they ripe in June?

A. They would stick to you.

Q. Was there any of them on the track?

A. Not in the middle of the track.

Q. I believe you say you saw some thistle?
A. Yes sir.
Q. Where were they?
A. Outside of the track.
Q. What kind of thistle were they?
A. I don't know; just thistle all I could tell you.
Q. Do you know Canadian thistle?
A. I don't know whether I do or not. There are two or three different kind of thistle.
Q. What kind were these?
A. These grow up with stickers on them and have berries on them.
Q. You say you always walked up the track itself when you went to work at the mine?
A. Yes sir.
44 Q. You didn't try to walk out through the growth, on the side of the track?
A. I could not.
Q. You didn't try it, did you?
A. Yes sir.
Q. You tried to walk on the outside?
A. I didn't try to walk on the outside because you couldn't on account of the weeds, they were so high you could not get through.
Q. What time was that?
A. In August.
Q. What time in August?
A. Nearly every day through August, last summer.
Q. And you just thought they were so thick you could not get through?
A. You could have gotten through, I suppose, if you forced yourself through, if you had to.
Q. But you didn't try?
A. No sir.
Q. How long have you known Mr. Anderson's land?
A. Twenty years.
Q. Been across it frequently?
A. Yes sir, many a time.
Q. Did you ever farm it for him?
A. Don't know that I ever did.
Q. Ever work on it for him?
A. Yes sir, I have worked on it.
45 Q. What time in the year were you working on his land?
A. Last year I made cider.
Q. Did you work any other year, besides last year?
A. I don't — that I ever did.
Q. Were you acquainted with his land before the railroad was constructed across it?
A. Yes sir.
Q. Did you notice what was raised on the farm?
A. Yes sir.
Q. What were some of the things that grew on his farm?

To which question, Counsel for Plaintiff, objected for the reason it is immaterial and not cross-examination. Which objection was by the Court sustained. To which ruling of the Court, Counsel for Defendant, at the time excepted.

Direct Examination of Ira S. Anderson, Witness for Plaintiff.

IRA S. ANDERSON, a competent and material witness, being first duly sworn and on behalf of the plaintiff, testified as follows:

Examined by Mr. CHARLES D. HUNT:

Q. State your name.
A. Ira S. Anderson.
Q. What relation are you to Champion S. Anderson?
A. His son.
Q. I will ask you if you know where your father's farm is
46 in Curry Township, Sullivan County, Indiana, just east of Currysville?
A. I reckon I ought to; I have known it for forty-five years; farmed it all my life.
Q. Do you know where it is?
A. I guess I do. It lays between the gravel road that runs from Shelburn in Curry Township, Sullivan County, Indiana.
Q. You know the particular farm that we are talking about here?
A. Yes.
Q. Now, do you know where the defendant's right-of-way is through that farm?
A. I do.
Q. Do you know about how wide that right-of-way is?
A. One hundred feet.
Q. Tell the Court where the track is with reference to the center of the right-of-way?
A. Supposed to be the center.
Q. And it appears to be, does it, by looking at it?
A. Yes sir, supposed to be the center.
Q. Tell the Court, if you were in and on that right-of-way or about there in July and August, 1911?
A. I was.
Q. You may state to the Court what growth was growing on the right-of-way that we have just described in the month of July and August, 1911, if anything?
A. There was briars, weeds, dock and mullen, I have pulled
47 many a stock of mullen off the right-of-way myself, because I farmed it.
Q. What dock did you see growing there on the right-of-way in these months?
A. Mostly sour dock.
Q. Just describe to the Court how much of that there was growing there at that time, in your own way?
A. Well there was certain patches, right smart patches. Places

where the right-of-way was cut out and the grass growed there was not so much.

Q. State to the Court, whether or not you saw any burrs?

A. Nothing only a small burr; don't think there were any large burrs, because I didn't allow them to grow; I pulled them up.

Q. Did you notice, in the months of July and August, any burrs, growing there on the right-of-way?

A. Yes sir, a small burr.

Q. Tell the Court how much you observed there?

A. The patches were not very large.

Q. Is that the best idea you can give the Court, of how much there was?

A. About four feet square, in places.

Q. How many and how often did they occur?

A. Extended at the south end, more than the north end; there was grass at the north end.

Q. Now, I will ask you whether or not there were any thistle growing on the right-of-way?

48 A. Small thistles; don't think there was any Canadian.

Q. What was growing there?

A. Small thistles.

Q. You may describe to the Court, the amount of these thistles there was growing on the right-of-way?

A. There was small patches; they did not extend the full length of the right-of-way.

Q. About how many of these patches?

A. A dozen patches or so. I crossed the railroad from his house to my house at the corner of the orchard.

Q. Do you know the kind of thistles these were?

A. I don't know the name of them.

Q. Describe to the Court the various kinds of weeds and the amount of them.

A. Milk weed, smart weed and most any kind of weed that grows, where you take the soil off the ground.

Q. How continuous and thick were they on the right-of-way?

A. Pretty thick, at the crossing. Probably three hundred feet where the most noxious weeds grew, at the north end, there were not so many, except the water willow.

Q. Tell the Court whether or not these growths of various kinds of weeds, burrs, docks and thistles were cut in the months of July and August, 1911?

A. They were not except a few feet at the public road;

49 they cut them a few feet on the public road; they were not in July and August. They were cut in January.

Cross-examination.

Cross-examined by Mr. BERT BEASLEY:

Q. You say it was mostly grass growing at the north end of the right-of-way?

A. There is not so much noxious weeds at the north end. Where the ditches run through there is willow weeds.

Q. Were there anything else in the ditches besides willow weeds?
A. Sour dock and burrs.
Q. Outside the ditches at the north end of the right-of-way is mostly grass?
A. Yes sir, and the water all washes down over his place to that and takes the seed off.

And now at this time, Counsel for Defendant, moves the Court, that the answer of witness be stricken from the record as not being responsive to the question. Which motion was by the Court sustained. To which ruling of the Court, Counsel for Plaintiff, at the time excepted.

Q. You don't know the kind of thistle that grew there?
A. I don't know.
Q. You don't know the Canadian thistle?
A. I don't think I do.
50 Q. Could a man walk across the grass patches on the north end of the right-of-way?
A. I guess, I have.
Q. In the months of July and August?
A. Yes—sir.
Q. Could he walk across the part of the right of way at the south end?
A. Part of it you could not.
Q. What was the matter there?
A. So many weeds and briars. More on the south end.
Q. What was there at the south end?
A. Well, it was not so bad as it is next to his orchard.
Q. A man could walk there, couldn't he?
A. Yes sir.
Q. How many patches of briars was there?
A. Mostly in one patch, right at the corner of his orchard and about one-third up the right-of-way.

Direct Examination of Oscar Rich, Witness for Plaintiff.

OSCAR RICH, a competent and material witness, being first duly sworn and on behalf of the plaintiff, testified as follows:

Examined by Mr. CHARLES D. HUNT:

Q. State your name.
A. Oscar Rich.
Q. Where do you live?
A. Sullivan.
Q. Do you know this right-of-way of the defendant, the
51 Chicago, Terre Haute and Southeastern Railway Company, that runs through Mr. Anderson's place in Curry Township?
A. Yes—sir.
Q. Did you know it in July and August, 1911?

A. I don't know as I did.
Q. When did you see it afterwards?
A. Along about the 10th or 11th of October.
Q. What year?
A. 1911.
Q. I will ask you to tell the Court if you could distinguish at that time, that the growth on the right-of-way had not been cut that year?

To which question, Counsel for Defendant, objected for the reason it calls for the opinion of the witness. Which objection was by the Court, sustained. To which ruling of the Court, Counsel for Plaintiff, at the time excepted.

Q. You may tell the Court, if you know, from your observation and what you saw there on the right-of-way in October, whether or not the weeds and growth along the right-of-way on Mr. Anderson's place had been cut in July and August, 1911?

To which question, Councerl for Defendant, objected for the reason it calls for the opinion of the witness, and for the further reason it calls for a conclusion. Which objection was by the Court
52 sustained. To which ruling of the Court, Counsel for Plaintiff, at the time excepted.

And now at this time it was agreed between plaintiff and defendant that the Chicago, Terre Haute and Southeastern Railway Company has been operating the railroad since the discharge of the receiver, prior to July 1911.
And now the plaintiff rests.
And now the defendant rests.
And this was all the testimony given in the cause.

Filed Dec. 6, 1912. Charles R. Railsback, Clerk Sullivan Cir. Court.

53 *Judge's Certificate to Bill of Exceptions.*

And be it further remembered that afterwards, to-wit, on the 9th day of September, 1912, the Court overruled defendant's motion for a new trial in said cause to which ruling of the court the defendant then and there excepted and asked and was granted by the court ninety days to file a bill of exceptions in this cause and now on the 4th day of December, 1912, within the time so granted by the court the said defendant now here tenders to the court in open court this its bill of exceptions containing all the evidence in said cause and asks that the same be signed, sealed, and made a part of the record in this cause, which said bill of exceptions was duly examined by the court, and found to contain all the evidence given in said cause, and is before filing duly signed by the judge, and the same is hereby ordered filed and made a part of the record in this cause, this 4th day of December, 1912.

WILLIAM H. BRIDWELL, *Judge.*

Filed Dec. 6, 1912. Charles R. Railsback, Clerk Sullivan Cir. Court.

54 *Entry Showing Filing Appeal Bond.*

The defendant, Chicago, Terre Haute and Southeastern Railway Company now files in open Court its appeal bond herein with Chas. A. Beasley and Joshua Beasley as sureties thereon, which bond is in the words and figures as follows, to-wit:

Appeal Bond.

Know all men by these presents, that we, Chicago Terre Haute and Southeastern Railway Company are held — firmly bound unto Champion S. Anderson in the penal sum of One Hundred ($100.00) Dollars to the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seal- and dated this 6th day of December 1912.

The condition of the above obligation is such, that whereas, heretofore, to-wit: On the 9" day of September 1912 the said Champion S. Anderson in the Sullivan Circuit Court recovered a Judgment against the Chicago, Terre Haute and Southeastern Railway Company for the sum of Twenty Five ($25.00) Dollars, in damages and costs of suit, etc.; from which Judgment of said Sullivan Circuit Court, the said Chicago Terre Haute and Southeastern Railway Company appealed to the Supreme Court of Indiana.

Filed Feb. 3, 1913. J. Fred France, Clerk.

55 Now if the said Chicago, Terre Haute and Southeastern Railway Company shall — and truly prosecute said appeal, and abide by and pay the judgment and costs, which may be rendered or affirmed against it then the above obligation to be null and void; otherwise to be and remain in full force and virtue in law.

CHICAGO, TERRE HAUTE AND SOUTHEASTERN RY. CO.
M. HARPUT, *President.* [SEAL.]

Attest:

E. T. FIDLER, *Secretary.* [SEAL.]
CHAS. A. BEASLEY. [SEAL.]
JOSH BEASLEY.

Approved Dec. 6th, 1912,

WILLIAM H. BRIDWELL, Judge.

Indorsed: No. 14819. Champion S. Anderson vs. Chicago, Terre Haute and Southeastern Railway Company. Appeal Bond. Amount $100.00. Filed Dec. 6, 1912. Charles R. Railsback, Clerk Sullivan Cir. Court.

And which bond is by the Court approved.
Record read and signed in open Court this 6" day of Dec. 1912.
WILLIAM H. BRIDWELL, *Judge.*

Filed Feb. 3, 1913. J. Fred France, Clerk.

And afterward to-wit: On the 30" day of January, 1913, the following further proceedings were had and made in said cause, to-wit:

Præcipe Filed.

Be it remembered that on this 30" day of January, 1913, the defendant herein, by its Attorneys, Lamb, Beasley, Douthitt and Crawford, filed in the office of the Clerk of the Sullivan Circuit Court of Sullivan County, Indiana, its Præcipe, which Præcipe is in the words and figures as follows, to-wit:

STATE OF INDIANA,
County of Sullivan, ss:

In the Sullivan Circuit Court, November Term, 1912.

CHAMPION S. ANDERSON
vs.
CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY.

Præcipe for Transcript.

To the Clerk of the Sullivan Circuit Court:

The defendant requests you to prepare and properly cer-
56 tify for use on appeal to the Supreme Court of the State of Indiana a transcript of the following papers, orders, and proceedings filed and had in the above entitled cause:

The transcript filed in said cause in the office of the Clerk on November 13 1911 by Robert Calvert, Justice of the Peace in and for Hamilton Township, Sullivan County, Indiana, including the complaint and proceedings had in said cause before said Justice of the Peace; Defendant's motion to make complaint more specific; demurrer to the complaint; the defendant's answer in general denial; the Court's finding in said cause; defendant's motion for new trial; defendant's motion in arrest of judgment; the appeal bond filed December 6" 1912, and all entries rules and orders of the Court respecting such bond; bill of exceptions filed December 6 1912, together with the entry showing the filing of the same, the Clerk to insert the original bill as prepared rather than make a copy thereof. All orders, rulings order book entries and exceptions made and taken in said cause respecting the aforesaid pleadings, papers and proceedings and the judgment therein rendered.

LAMB, BEASLEY, DOUTHITT
AND CRAWFORD,
Attorneys for Defendant.

Indorsed: No. 14819. Sullivan Circuit Court. Champion S. Anderson vs. Chicago, Terre Haute and Southeastern Ry. Co. Præcipe. Filed Jan- 30 1913. Charles R. Railsback Clerk Sullivan Cir. Court. Lamb, Beasley, Douthitt and Crawford, Att'ys for Def't.

Clerk's Certificate.

57 STATE OF INDIANA,
County of Sullivan, ss:

I, Charles R. Railsback, Clerk of the Sullivan Circuit Court of the County of Sullivan, in the State of Indiana, do hereby certify the foregoing to be a full, true and complete transcript of the record of the proceedings and of papers and pleadings, to-wit: The transcript filed in said Clerk's office November 13th, 1911 by Robert Calvert, Justice of the Peace; including the complaint and proceedings had in said cause before said Justice of the Peace; defendant's motion to make complaint more specific; demurrer to complaint; the defendant's answer in general denial; the Court's findings in said cause; defendant's motion for new trial; defendant's motion in arrest of judgment; the appeal bond filed December 6th 1912; as the same are filed and on file and of all Order Book entries of all orders and rulings of the Court in said cause, as required in Defendant's Præcipe, and the final judgment of the Court in the Cause, of Champion S. Anderson vs. Chicago, Terre Haute and Southeastern Railway Company, being No. 14819 of the Civil causes of the said Sullivan Circuit Court, except that the original bill of exceptions is embodied herein without copying the same, as the same appear of record and on file in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court at my office in Sullivan Indiana, this 30" day of January A. D. 1913.

[SEAL.] CHARLES R. RAILSBACK,
Clerk Sullivan Circuit Court.

Filed Feb. 3, 1913. J. Fred France, Clerk.

58 STATE OF INDIANA:

In the Supreme Court.

CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY COMPANY, Appellant,
vs.
CHAMPION S. ANDERSON, Appellee.

Appellant's Assignment of Errors.

The appellant says that there is manifest error in the judgment and proceedings in this cause in this:

1. The court erred in overruling appellant's motion to make appellee's complaint more specific.
2. The court erred in overruling appellant's demurrer to appellee's complaint.
3. The court erred in overruling appellant's motion for a new trial.
4. The court erred in overruling appellant's motion in arrest of judgment.

LAMB, BEASLEY, DOUTHITT & CRAWFORD,
Attorneys for Appellant.

Filed Feb. 3, 1913. J. Fred France, Clerk.

59 And afterwards, to-wit: on the 5th day of March, 1913, the same being the 87th Judicial Day of the November Term, 1912, of said Supreme Court, the following further pleas and proceedings were had in said cause to-wit:

Come now the parties, by counsel, and this cause is submitted to the court for judgment and decree as provided by the act of the General Assembly of the State of Indiana, approved April 13, 1885, and the rules of said Supreme Court adopted in relation thereto.

60 And afterwards, to-wit: on the 2nd day of May, 1913, the same being the 137 Judicial Day of the November Term 1912, of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the Appellant by counsel, and files its briefs (8) in the words and figures following: (Here insert)

And afterwards, to-wit: on the 31st day of May, 1913, the same being the 6th Judicial Day of the May Term, 1913, of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the Appellee by counsel and files a petition herein for additional time in which to file brief for Appellee.

And on the same day the following further pleas and proceedings were had herein.

Comes the Appellee by counsel and the Court being advised in the premises, grants Appellee's petition on file herein for additional time in which to file brief and time is granted to and including August 1, 1913.

And afterwards, to-wit: on the 30th day of July 1913, the same being the 57th Judicial Day of the May Term, 1913 of said Supreme Court the following further pleas and proceedings were had herein:

Comes now the Appellee by counsel and files his brief (8) in the words and figures following: (Here Insert)

61 And afterwards, to-wit: On the 13th day of August, 1913, the same being the 70th Judicial Day of the May Term 1913,

of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the Appellant by counsel and files its reply briefs (8) in the words and figures following, to-wit: (Here Insert)

62 And afterwards, to-wit: on the 30th day of April 1913, the same being the 136th Judicial Day of the November Term 1913, of said Supreme Court, the following further pleas and proceedings were had herein:

Come now the parties by counsel, and the Court being advised in the premises, Affirms the judgment of the Court below with the following opinion pronounced by Erwin, Judge. Here Insert).

63 THE STATE OF INDIANA:

In the Supreme Court, November Term, 1913.

On the 30th day of April 1914, being the 136th Judicial day of said November Term, 1913.

Hon. Douglas Morris, Chief Justice.
Hon. Charles E. Cox,
Hon. Richard K. Erwin,
Hon. Quincy A. Myers,
Hon. John W. Spencer,
Associate Justices.

No. 22340.

In the Case of—

CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY COMPANY
vs.
CHAMPION S. ANDERSON.

Appealed from the Sullivan Circuit Court.

Come the parties by their Attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by Erwin, J.

64 This action was commenced before a Justice of the Peace by appellee against appellant to recover the statutory penalty of $25.00, for failure to cut thistles, burrs, noxious weeds, etc., as provided in §5524 and §5525 Burn's 1908.

From a judgment for the amount of the statutory penalty of $25.00 and costs, rendered by the Justice of the Peace, appellant appealed to the circuit court.

Appellant, in the circuit court, filed its motion to make the complaint more specific, which motion was overruled. Appellant then filed its demurrer, which was overruled.

Upon the issues formed by a general denial to the complaint, the

cause was tried by the court, without the intervention of a jury, and resulted in a finding and judgment for the statutory penalty of $25.00.

The errors relied upon for reversal in this court are, 1st. The overruling of appellant's motion to make appellee's complaint more specific; 2nd. Overruling appellant's demurrer to appellee's complaint; 3rd. The overruling of the motion for a new trial; 4th. The overruling of the motion in arrest of judgment.

Appellant contends that the act of March 6th 1889, being §5524 and §5525 Burn's 1908, is unconstitutional and void in that it denies the appellant the equal protection of the laws and is in violation of the 14th amendment to the Federal Constitution, and that it imposes duties and obligations upon railroad corporations with respect to lands occupied by them, which are not imposed upon other citizens, whether individuals or corporations, with respect to lands occupied by them.

The act in question reads as follows:

SEC. 1. "Be it enacted by the General Assembly of the State of Indiana, That all railroad corporations doing business in this state shall, between the first day of July and the twentieth day of August in each year cause all thistles, burrs, docks and noxious weeds growing on lands occupied by them in any city, village or township of this state, to be cut down and destroyed.

SEC. 2. In case any railroad company shall refuse or neglect to comply with the requirements specified in the first section of this act, such company shall be liable in a penalty of twenty-five
65 dollars, to be prosecuted for in an action of debt by any person feeling himself aggrieved. Said suit may be brought before any Justice of the Peace in the county, who shall require of the complainant surety to pay costs in case he fails to maintain his action. Summons may be served on any agent or officer of the company."

The right to impose restraints upon the use and disposal of articles found by experience, or upon inspection to be injurious to the health, morals or general welfare of her citizens belongs to the state, and come under the police regulation, and if the law is uniform and general and apply to all persons in the same circumstances and treat them alike the act could not be said to be in conflict with the 14th amendment to the constitution or contravene §23, Art. 1 of the State constitution. Levy v. State, 161 Ind. 251; Davis Coal Co. v. Pollard, 157 Ind. 602-617; Parks v. State, 159 Ind. 211, 215; State v. Barrett, 172 Ind. 169; Hirth-Krause Co. v. Cohen, 178 Ind. 1; Vandalia R. Co. v. Stilwell, — Ind. —; 104 N. E. 289, and cases cited.

Police power is the name given to that inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires. 8 Cyc. 863.

It is contended further that as there are no averments of any

actual damages sustained by appellee that the complaint is insufficient. This was not necessary. Western Union Tel. Co. v. Ferguson, 157 Ind. 37; Penn. Co. v. State, 142 Ind. 428.

It is further contended by appellant that the statute imposing a penalty *by* failure to cut weeds etc. in favor of "any person aggrieved," but who has suffered no damages as a result of such failure, deprives the railway corporation of its property without due process of law and without compensation, in violation of § 21 Art. 1 of the state constitution, and of the 14th amendment to the Federal Constitution.

66 The penalty imposed is for violation of a duty required of appellant, and it is not in a position to complain that the penalty when collected shall be paid to the complaining party, and this is not available in defense of an action for the recovery of the penalty prescribed. Penna. Co. v. State, 142 Ind. 428-437; Western Union Tel. Co. v. Ferguson, 157 Ind. 37-40, and cases cited.

The appellant insists that the court erred in overruling its motion for a new trial for the reason there is no evidence to support the finding of the court. This is a cause in which this court has no power to review any other question save that of the constitutionality of the act in question.

The statute authorizing appeals in cases of this class is as follows: "No appeal shall hereafter be taken to the supreme court or appellate court in any civil case where the amount in the controversy, exclusive of interest and costs, does not exceed $50.00, except as provided in section 8 of this act." 1389 Burn's 1914. Section 8 is as follows:

"Every case in which there is in question, and such question is duly presented, either the validity of a franchise or the validity of an ordinance of a municipal corporation or the constitutionality of a statute, state or federal, or the proper construction of a statute, or rights guaranteed by the state or federal constitution and which case would be otherwise unappearable (unappealable) by virute of section six or section seven, shall be appealable directly to the supreme court, for the purpose of presenting such question only." § 3191 Burn's 1914.

It will be seen that the appeal is allowable "for the purpose of presenting such question only" that is the constitutionality of sections 5524 and 5525 Burn's 1908.

As to whether the proper conclusion has been reached by the trial court on the merits of the case, this court has no power to determine. Stultz v. Board etc. 168 Ind. 539-545; Terre Haute etc. R. Co. v. Erdel, 158 Ind. 344-348.

Having decided that the act in question is constitutional and having no power to review any other question presented this judgment is affirmed.

67 And afterwards, to-wit: on the 11th day of June, 1914, the same being the 11th Judicial Day of the May Term 1914, of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the appellant by counsel and files its petition for a rehearing herein with briefs (8) thereon, in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 1st day of July 1914, the same being the 33rd Judicial Day of the May Term, 1914 of said Supreme Court, the following further pleas and proceedings were had herein:

Come now the parties by counsel and the Court being advised in the premises, overrules the petition for a rehearing heretofore filed herein.

68 And afterwards, to-wit: on the 8th of July 1914, the same being the 39th Judicial Day of the May Term 1914, of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the Appellant by counsel, and files in the office of the Clerk of the Supreme Court, its petition for the allowance of a writ of error, said petition and the allowance thereof being hereto next below attached, and being as follows:

69 In the Supreme Court of Indiana.

CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

CHAMPION S. ANDERSON, Defendant in Error.

To the Honorable Charles E. Cox, Chief Justice of the Supreme Court of Indiana:

The petition of Chicago, Terre Haute and Southeastern Railway Company, the plaintiff in error, hereby sets forth that on the 1st day of July, 1914, the Supreme Court of Indiana made and entered a final order herein in favor of defendant in error, Champion S. Anderson, and against Chicago, Terre Haute and Southeastern Railway Company, plaintiff in error, in which final order and judgment, and the proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of Chicago, Terre Haute and Southeastern Railway Company, plaintiff in error, all of which will appear more in detail from the assignment of errors filed with this petition.

That the Supreme Court of Indiana is the highest court of the State of Indiana in which a decision in this suit and this matter could be had.

Wherefore, Chicago, Terre Haute and Southeastern Railway Company, plaintiff in error, petitions and prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of Indiana, for the correction of error so complained of, and that a transcript of the record, proceedings and

papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 7th day of July, 1914.

70 J. C. HUTCHINS,
W. F. PETER,
Attorneys for Chicago, Terre Haute and Southeastern Railway Company, Plaintiff in Error.

Order.

The writ of error prayed for in the foregoing petition is hereby allowed this 7th day of July, 1914, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of five hundred dollars ($500).

CHARLES E. COX,
Chief Justice of the Supreme Court of Indiana.

71 [Endorsed:] In the Supreme Court of Indiana. Chicago, Terre Haute and Southeastern Railway Company, Plaintiff in Error, vs. Champion S. Anderson, Defendant in Error. Petition for Writ of Error. Filed Jul- 8' 1914. J. Fred France, Clerk. W. F. Peter, J. C. Hutchins, Attorneys for Plaintiff in Error.

72 And on the same day the following further pleas and proceedings were had in said Court, in said cause:

Comes now the Appellant by counsel, and files a writ of error from the Supreme Court of the United States, to the said Supreme Court of Indiana, in this cause, said writ of error being hereto next below attached, and being as follows:

73 UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Supreme Court of Indiana, Greeting:

Because in the record and proceedings, as also on the rendition of the judgment of a plea which is in the said Supreme Court, before you, between Chicago, Terre Haute & Southeastern Railway Company and Champion S. Anderson, a manifest error hath happened, to the great damage of the said Chicago, Terre Haute & Southeastern Railway Company, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done

therein to correct that error, what of right and according to the law and custom of the United States should be done.

Winess the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of said District Court, this 8th day of July, A. D. 1914.

[Seal District Court of the United States, District of Indiana.]

NOBLE C. BUTLER,
Clerk of the District Court of the United States for the District of Indiana.

Copy of the above writ for the defendant in error lodged in the Clerk's Office of the Supreme Court of Indiana on the 8th day of July, 1914.

In obedience to the above writ I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the above entitled cause, this 21st day of July, A. D. 1914.

J. FRED FRANCE,
Clerk of the Supreme Court of Indiana.

[Endorsed:] No. —. District Court of the United States for the District of Indiana. Chicago, Terre Haute & Southeastern Railway Co., Plaintiff in Error, vs. Champion S. Anderson, Defendant in Error. Writ of Error to the Supreme Court of the United States. Filed Jul- 8, 1914. J. Fred France, Clerk.

74 And on the same day the following further pleas and proceedings were had in said Court in said cause:

Comes now the Appellant by counsel and files a præcipe in the office of the Clerk of the Supreme Court, being hereto next below attached, and being as follows:

75 In the Supreme Court of Indiana.

No. 22340.

CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY COMPANY
vs.
CHAMPION S. ANDERSON.

Præcipe.

To the Clerk of the Supreme Court of Indiana:

You will please prepare for use on the appeal of the above cause to the Supreme Court of the United States a certified transcript of all the pleadings and papers filed in your office in this cause, viz., a certified copy of the complete transcript as filed herein on appeal from the Sullivan Circuit Court together with the petition for writ of error, assignment of errors and prayer for reversal filed herein

and attach thereto the original writ of error issued by the Clerk of the District Court of the United States on July 8th, 1914, in this cause.

Dated July 8th, 1914.

W. F. PETER,
Att'y for Chicago, Terre Haute & Southeastern Ry. Co.

[Endorsed:] Filed Jul- 8, 1914. J. Fred France, Clerk.

76 In the Supreme Court of Indiana.

CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY
vs.
CHAMPION S. ANDERSON.

Præcipe.

To the Clerk of the Supreme Court of Indiana:

You will please prepare for use on the appeal in the above entitled cause to the Supreme Court of the United States, a certified transcript of all the pleadings and papers filed in your office in this cause, including a copy of the complete transcript, as filed herein on appeal from the Sullivan Circuit Court, together with the petition for writ of error, assignment of errors, prayer for reversal and citation, filed herein, and annex to and transmit with such certified transcript of the record, the original writ of error issued by the clerk of the District Court of the United States in this cause, dated July 8th, 1914, and a copy of the opinion or opinions filed in this case.

Dated July 9th, 1914.

J. C. HUTCHINS &
W. F. PETER,
Attorneys for Chicago, Terre Haute and Southeastern Railway Company, Plaintiff in Error.

The undersigned, attorneys for Champion S. Anderson, defendant in error, acknowledge service of a copy of the above præcipe this 10th day of July, 1914.

HUNT & GAMBILL,
CHARLES D. HUNT,
GILBERT W. GAMBILL,
Att'ys for Champion S. Anderson.

77 And on the same day the following further pleas and proceedings were had in said Court, in said cause:

Comes now the appellant by counsel, and files its bond on appeal to the Supreme Court of the United States with the Massachusetts Bonding and Insurance Company, as sureties thereon, in the penal sum of Five Hundred ($500.00) Dollars, which bond is taken and approved, being hereto next below attached, and being as follows:

78 [SEAL.] Massachusetts Bonding and Insurance Company, Home Office, Boston, Massachusetts.

At a regular Meeting of the Board of Directors of the Massachusetts Bonding and Insurance Company, held at the principal office of said Company in Boston, Mass., on the 20th day of June, 1912, the following Resolution was adopted and is still in force:

Whereas, the Massachusetts Bonding and Insurance Company has been duly authorized to transact business in the States of Illinois, Indiana, Kansas and Missouri, under the Insurance Laws thereof, as evidenced by Certificates given under the hand and seal of the Insurance Commissioners of said States, and

Whereas, the said Company has established Offices at 108 South La Salle Street, in the City of Chicago, Illinois, and

Whereas, for the purpose of facilitating the prompt and efficient transaction of its business, it is necessary that this Company appoint resident Vice Presidents, Managers, Resident Assistant Secretaries, Agents or Attorneys, with power and authority to act for it and in its name, therefore, be it

Resolved, that this Company do and it hereby does appoint Fred M. Blount as its Resident Vice President, Phillip B. Shillito as its Manager and Attorney-in-Fact, Charles F. Weinland and Harry D. Blount as its Resident Assistant Secretaries and Attorneys-in-Fact, and authorizes and empowers the said Fred M. Blount as Resident Vice-President, jointly with the said Phillip B. Shillito as Manager or Attorney-in-Fact, or either one of them, when attested by Charles F. Weinland or Harry D. Blount as Resident Assistant Secretary or as Attorney-in-Fact, to execute in the States of Illinois, Indiana, Kansas and Missouri, attach the Seal of this Company and deliver, any and all contracts guaranteeing the fidelity of persons holding places of public or private trust, guaranteeing the performance of contracts, other than insurance policies and executing and guaranteeing bonds and undertakings required or permitted on all transactions or proceedings or by law allowed.

I, R. C. De Normandie, Assistant Secretary of Massachusetts Bonding and Insurance Company, do hereby certify that the above and foregoing is a full, true and correct copy of a Resolution passed by the Board of Directors of the said Company at a regular meeting thereof, duly called and held on the 20th day of June, A. D., 1912, a quorum being present, as the same appears on the records of the Company now in my possession and custody as Assistant Secretary, and that the said Resolution is still in full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the Corporate Seal of the said Company at the City of Boston, Massachusetts, this 16th day of April, A. D., 1914.

[SEAL.] R. C. DE NORMANDIE,
Assistant Secretary.

79 Know all men by these presents, that Chicago, Terre Haute and Southeastern Railway Company, a corporation of the State of Indiana, and Massachusetts Bonding and Insurance Company, a corporation duly organized and existing under the laws of the State of Massachusetts, are held and firmly bound to Champion S. Anderson in the sum of Five Hundred Dollars ($500.00), for the payment of which well and truly to be made unto the said Champion S. Anderson, his heirs, executors, administrators and assigns, the said Chicago, Terre Haute and Southeastern Railway Company and the said Massachusetts Bonding and Insurance Company bind themselves, their successors and assigns, jointly and firmly, by these presents.

Now, the condition of the above obligation is such, that

Whereas, the above named Champion S. Anderson has heretofore brought a suit against said Chicago, Terre Haute and Southeastern Railway Company in the Circuit Court of Greene County, Indiana, and

Whereas, the said Chicago, Terre Haute and Southeastern Railway Company, simultaneously with the filing of this bond, intends to cause a writ of error to issue, and to bring up for review before the Supreme Court of the United States the said judgment of the Supreme Court of Indiana;

Now, therefore, if the said Chicago, Terre Haute and Southeastern Railway Company shall prosecute its case in the Supreme Court of the United States upon such writ of error, and shall well and truly pay such judgment and all costs that may be taxed by the Supreme Court of the United States, if said Court shall hold that said judgment was rightfully rendered by the Supreme Court of Indiana, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

In witness whereof, said Chicago, Terre Haute and South-
80 eastern Railway Company and the said Massachusetts Bonding and Insurance Company have caused these presents to be signed by their respective officers and their respective corporate seals to be hereunto affixed this Sixth day of July, A. D. 1914.

[SEAL.] CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY,
By W. J. CARPENTER, *President.*

Attest:
C. E. HAIR,
Assistant Secretary.

MASSACHUSETTS BONDING AND INSURANCE COMPANY,
By FRED M. BLOUNT, *Resident Vice-President.*

Attest:
[SEAL.] CHARLES F. WEINLAND,
Resident Assistant Secretary.

Approved:
CHARLES E. COX, *C. J.*

7/8/14.

81 And on the same day the following further pleas and proceedings wer- had in said Court, in said cause:

Comes now the Appellant by counsel, and files its citation on said writ of er[illegible], duly signed by Hon. Charles E. Cox, Chief Justice of the Supreme Court together with proof of service of the citation on the Attorneys for the defendant in error, said citation and proof of service thereof being hereto next below attached and being as follows:

82 In the Supreme Court of Indiana.

CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY
vs.
CHAMPION S. ANDERSON.

UNITED STATES OF AMERICA,
State of Indiana, ss:

Citation.

To Champion S. Anderson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within 30 days from the date of the signing of this citation pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Indiana, wherein the Chicago, Terre Haute and Southeastern Railway Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Charles E. Cox, Chief Justice of the Supreme Court of the State of Indiana, this 8th day of July, A. D., nineteen hundred and fourteen.

CHARLES E. COX,
Chief Justice of the Supreme Court of the State of Indiana.

Acknowledgment of Service.

Filed This July 21, 1914. J. Fred France, Clerk.

We hereby accept service of the above and foregoing Citation for the above named Champion S. Anderson, this 18th day of July, A. D., 1914.

CHARLES D. HUNT,
GILBERT W. GAMBILL,
HUNT & GAMBILL,
Attorneys for said Champion S. Anderson.

Filed Jul- 11 1914. J. Fred France, Clerk.

83 [Endorsed:] In the Supreme Court of Indiana. Chicago, Terre Haute and Southeastern Railway Company vs. Champion S. Anderson. Citation.

84 And on the same day the following further pleas and proceedings were had in said Court in said cause:

Comes now the Appellant by counsel and files a petition for the Reversal of the judgment rendered in said cause, which petition is hereto next below attached and being as follows:

85 To the Honorable the Supreme Court of the United States:

CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

CHAMPION S. ANDERSON, Defendant in Error.

Prayer for Reversal.

Now comes Chicago, Terre Haute and Southeastern Railway Company, plaintiff in error, and prays for a reversal of the judgment of the Supreme Court of Indiana in the action brought by Champion S. Anderson against Chicago, Terre Haute and Southeastern Railway Company, which judgment was entered on the 1st day of July, 1914; and also prays for a reversal of the judgment in said cause of the Circuit Court of Sullivan County, Indiana, entered on or about September 9th, 1912.

W. F. PETER,
J. C. HUTCHINS,
Attorneys for Chicago, Terre Haute and Southeastern Railway Company, Plaintiff in Error.

86 [Endorsed:] In the Supreme Court of Indiana. Chicago, Terre Haute and Southeastern Railway Company, Plaintiff in Error, vs. Champion S. Anderson, Defendant in Error. Prayer for Reversal. Filed Jul- 8, 1914. J. Fred France, Clerk. W. R. Peter, J. C. Hutchins, Attorneys for Plaintiff in Error.

87 And on the same day the following further pleas and proceedings were had in said Court in said cause:

Comes now the Appellant by counsel, and files an Assignment of Errors in the Supreme Court of the United States, on the writ of error herein, said assignment of errors being hereto next below attached, and being as follows:

88 Supreme Court of Indiana.

CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPA
Plaintiff in Error,
vs.
CHAMPION S. ANDERSON, Defendant in Error.

Assignment of Errors.

Now comes Chicago, Terre Haute and Southeastern Railway Co pany, plaintiff in error, and respectfully submits that in the reco proceedings, decision and final judgment of the Supreme Court Indiana, in the above entitled matter, there is manifest error, to-w

(1) The Supreme Court of the State of Indiana erred in refusi to reverse the judgment of the Circuit Court of Greene County, diana, in this cause, adjudging that the act of the General Assem of the State of Indiana, approved March 6, 1899, entitled "An Concerning the cutting and destroying of thistles, burrs, docks a other noxious weeds by railroad corporations" is not invalid as bei repugnant to the Fourteenth Amendment of the Constitution of t United States, for the reason that said Act denies plaintiff in Er herein the equal protection of the laws and deprives it of its prope without due process of law.

(2) The Supreme Court of the State of Indiana erred in adjud ing that said Act approved March 6, 1899, does not deny plaintiff error herein the equal protection of the laws.

(3) The Supreme Court of the State of Indiana erred in adjud ing that said Act approved March 6, 1899 does not deprive plaint in error of its property without due process of law.

(4) The Supreme Court of the State of Indiana erred in adjud ing that said Act approved March 6, 1899 is not repugnant to t provisions of the Fourteenth Amendment to the Constitution of t United States.

J. C. HUTCHINS,
W. F. PETER,
Attorneys for Plaintiff in Error.

89 [Endorsed:] In the Supreme Court of Indiana. Chicag Terre Haute and Southeastern Railway Company, Plaint in Error, vs. Champion S. Anderson, Defendant in Error. Assig ment of Errors. Filed Jul- 8, 1914. J. Fred France, Clerk. W. Peter, J. C. Hutchins, Attorneys for Plaintiff in Error.

90 STATE OF INDIANA:

In the Supreme Court.

I, J. Fred France, Clerk of the Supreme Court of the State of I diana, certify the above and foregoing to be a full, true and cor plete transcript of the record of proceedings had, papers filed, m

tions decided, rulings made, opinion delivered, judgments rendered, and all decrees and orders entered in the Supreme Court of Indiana, in the above entitled cause, Number 22340, Chicago, Terre Haute and Southeastern Railway Company vs. Champion S. Anderson, appealed from the Sullivan Circuit Court; also the original petition for the allowance of the writ of error and assignment of errors, the original writ of error from the Supreme Court of the United States to the Supreme Court of Indiana, with the allowance thereof; the original citation to the defendant in error and proof of service thereof; a copy of the original bond and its approval by the Chief Justice of said Supreme Court.

Which said transcript, annexed hereto, together with said original petition for the allowance of a writ of error, and assignment of errors, said original writ of error, original citation, copy of the original bond. I hereby certify as and for my full return to said writ of error in accordance with præcipe of appellant herein.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court at the City of Indianapolis, Indiana, this 21st day of July, 1914.

[Seal Supreme Court, State of Indiana.]

J. FRED FRANCE,
Clerk Supreme Court of Indiana.

Endorsed on cover: File No. 24,330. Indiana Supreme Court. Term No. 218. The Chicago, Terre Haute & Southeastern Railway Company, plaintiff in error, vs. Champion S. Anderson. Filed August 6, 1914. File No. 24,330.

FILED
FEB 3 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 2[redacted]34

CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

CHAMPION S. ANDERSON,
Defendant in Error.

BRIEF ON BEHALF OF CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY.

JAMES C. HUTCHINS,
WILLIAM F. PETER,
Of Counsel for Chicago, Terre Haute and Southeastern Railway Company.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 218

CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

CHAMPION S. ANDERSON,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR,

CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY.

I.

STATEMENT OF THE CASE.

This action was commenced before a Justice of the Peace, by the defendant in error against the plaintiff in error, to recover the statutory penalty of $25.00, provided for in Section 2 of the Act approved March 6, 1889, entiled "An Act concerning the cutting and destroying of thistles, burrs, docks and other noxious weeds

by railroad corporations." (Acts 1889, p. 146, Burns R. S. 1914, Secs. 5524 and 5525.) Said Act is as follows:

> 1. That all railroad corporations doing business in this state shall, between the first day of July and the twentieth day of August in each year, cause all thistles, burrs, docks and other noxious weeds growing on lands occupied by them in any city, village or township of this state, to be cut down and destroyed.
>
> 2. In case any railroad company shall refuse or neglect to comply with the requirements specified in the first section of this act, such company shall be liable in a penalty of twenty-five dollars, to be prosecuted for in an action of debt by any person feeling himself aggrieved. Said suit may be brought before any justice of the peace in the county, who shall require of the complainant surety to pay costs in case he fails to maintain his action; summons may be served on any agent or officer of the company.

Plaintiff in error filed its demurrer to the complaint and a memorandum therewith stating wherein the complaint was insufficient for want of facts (Tr., pp. 9, 10.) The third ground of said memorandum being as follows:

> "3. The act approved March 6, 1889, entitled 'An Act concerning the cutting and destroying of thistles, burrs, docks and other noxious weeds by railroad corporations,' Acts 1889, p. 146, and being Secs. 5524 and 5525, Burns' R. S. 1908, and each section thereof is unconstitutional."

Plaintiff in error thereafter filed its motion in arrest of judgment (Tr., p. 13), the fourth ground of which was as follows:

> "4. The act approved March 6th, 1889, entitled 'An Act concerning the cutting and destroying of thistles, burrs, docks and other noxious weeds by railroad corporations,' Acts 1889, p. 146, and being Secs. 5524 and 5525, Burns' R. S. 1908, and each section thereof is unconstitutional."

The case was tried by the court, which found for defendant in error in the sum of $25.00, and upon this de-

cision judgment was rendered in favor of defendant in error. (Tr., p. 11.)

The error of the trial court in overruling said demurrer to the complaint, and said motion in arrest of judgment, were assigned as errors in the Supreme Court of the State of Indiana. (Tr., pp. 33-34.)

The judgment of the lower court was affirmed by the Supreme Court of the State of Indiana on April 30, 1914; see Tr., pp. 35 to 37 for opinion. A petition for rehearing was filed by plaintiff in error (Tr., p. 38) which was overruled. Whereupon plaintiff in error on July 8, 1914, sued out the present writ of error to this court.

II.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Supreme Court of the State of Indiana erred in refusing to reverse the judgment of the Circuit Court of Greene County, Indiana, in this cause, adjudging that the act of the General Assembly of the State of Indiana, approved March 6, 1889, entitled "An Act Concerning the cutting and destroying of thistles, burrs, docks and other noxious weeds by railroad corporations" is not invalid as being repugnant to the Fourteenth Amendment of the Constitution of the United States, for the reason that said Act denies plaintiff in error herein the equal protection of the laws and deprives it of its property without due process of law.
2. The Supreme Court of the State of Indiana erred in adjudging that said Act approved March 6, 1889, does not deny plaintiff in error herein the equal protection of the laws.
3. The Supreme Court of the State of Indiana erred in adjudging that said Act approved March 6, 1889, does not deprive plaintiff in error of its property without due process of law.
4. The Supreme Court of the State of Indiana

erred in adjudging that said Act approved March 6, 1889, is not repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States.

The constitutional questions were presented to the court below; first, by the demurrer to the complaint, the third point of appellant's memorandum specifically raising this question; second, by the motion for a new trial, seven ground, to the effect that the decision of the court is contrary to law; and third, by the fourth ground named in the motion in arrest of judgment, which specifically raises the constitutionality of the statute and each section thereof. We believe it to be immaterial under which of these heads this court may consider the constitutional questions, as they are presented by each method with equal force.

BRIEF OF ARGUMENT.

POINT I.

(Denial of Equal Protection of the Laws—Assignments of Error Nos. 1, 2 and 4.)

THE SEPARATION OF OCCUPIERS OF REAL ESTATE INTO TWO CLASSES—(1) RAILWAY CORPORATIONS AND (2) ALL OTHERS—IS AN UNNATURAL AND UNJUSTIFIABLE CLASSIFICATION WITH RESPECT TO THE OBLIGATION IMPOSED OF CUTTING DOWN WEEDS GROWING ON LANDS OCCUPIED, AS THERE IS NO RELATION BETWEEN THE LINE OF DIVISION OF THE CLASSES AND THE SUBJECT MATTER.

The title to the act involved is as follows, "An Act concerning the cutting and destroying of thistles, burrs, docks and other noxious weeds by railroad corporations." The act by both title and text is limited in its operation solely to railroad corporations. Note further, that the act operates with respect to lands *occupied* by railroad corporations and not to lands merely *owned* by them; that is to say, it operates upon railroad corporations as *occupiers* of lands "in any city, village or township of this state." It follows, therefore, as a matter of statutory construction, that if a railway company should own a tract of land and this tract should be occupied, under lease or otherwise, by any individual, firm or other-than-railroad corporation, the railway company would be under no duty to cut down and destroy the thistles, burrs, docks and other noxious weeds growing thereon between July 1st and August 20th. And likewise, if any individual, firm or corporation other than railroad should be the owner of a tract of land, and the same should

be occupied by a railroad corporation under lease from the owner, the railroad corporation lessee, would be required to perform the acts specified in Section 1 of said Act, for the reason that it would be occupying the land. We repeat, therefore, that the act operates solely upon lands *occupied* by railroad corporations without reference to the *ownership* of those lands.

The statute makes a classification of occupiers of lands in the state, classifying them into two classes, as follows: (1) railroad corporation occupiers; (2) all other occupiers, and lays specified duties upon class One only, from which class Two is exempt. We concede that the legislature has power to classify, and that because it has attempted to deal with less than the whole number of citizens or persons with respect to the duties, obligation or privileges conferred by a statute, their act is not necessarily invalid thereby; and that the clause in the 14th Amendment to the federal constitution, respecting the equal protection of the laws, does not prevent such classification. The exceptions to, and limitations upon, the legislative power of classification are equally well settled. These principles have never been better expressed than by Justice Brewer in the case of *Gulf, etc., Ry. Co.* v. *Ellis,* 165 U. S., 150. Upon the subject of classification, Justice Brewer said:

> "But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that, if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true [citing cases], yet it is equally true that such classification can not be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone

> thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis."

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, Mr. Justice Harlan, after condemning an anti-trust statute of Illinois which applied to every one "except producers of agricultural commodities and raisers of livestock," said:

> "The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. But this court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed. * * * Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

As said in *M. K. & T. Railway Co.* v. *May*, 194 U. S., 267, "There is no dispute about general principles." It is, as this court had occasion to say in *Ry. Co.* v. *Seegers*, 207 U. S., 73, "the application of those principles to the different cases [which] is often attended with much difficulty." All the authorities expressly and uniformly hold that if the classification made by a statute is not inherent in the subject matter, and if the separation of citizens into one class or another is made along a line which has not some reasonable and just relation to the act in respect to which the classification is proposed, the statute is invalid.

We submit to the court that there is no possible defense to the classification contained in the Act in question under the principles announced in the cases cited. The subject matter of the Act is cutting down noxious weeds by a railroad corporation upon land occupied by it. We submit that there is no distinction between occupancy of land by a railroad corporation and the occupancy of land by an individual, a partnership, or other-than-railroad corporation. There is no quality, condition or state of things peculiar to the occupancy of land by a railroad corporation as distinguished from occupancy by any other person, firm or corporation. The distinction between railroad occupiers and all others, does not rest upon any difference between the character of the respective occupants which bears any relation whatsoever to the Act (*i. e.*, cutting down noxious weeds) in respect to which the classification has been made. In the opinion of the Supreme Court of Indiana is found the following (Tr., p. 36):

> "The right to impose restraints upon the use and disposal of articles found by experience, or upon inspection to be injurious to the health, morals or general welfare of her citizens belongs to the state, and comes under the police regulation, and if the law is uniform and general and applies to all persons in the same circumstances and treats them alike, the act could not be said to be in conflict with the 14th amendment to the constitution or contravene Sec. 23, Art. 1 of the State constitution. *Levy* v. *State,* 161 Ind., 251; *Davis Coal Co.* v. *Pollard,* 157 Ind., 602, 617; *Parks* v. *State,* 159 Ind., 211; *State* v. *Barrett,* 172 Ind., 169; *Hirth-Krause Co.* v. *Cohen,* 178 Ind., 1; *Vandalia R. Co.* v. *Stilwell,* ..... Ind., ...; 104 N. E., 289, and cases cited."

And this is all that that court had to say by way of statement or discussion upon the subject. We submit that there is a serious omission in this statement of the

law. Plaintiff in error has at no time denied the right of the legislature to compel land owners or occupiers to cut down noxious weeds, and we concede that such compulsion would be a valid exercise of the police power. But even an exercise of the police power cannot be directed arbitrarily against a single class of citizens. The above statement by the Indiana court has absolutely nothing to say of the fact that here the legislature has directed its power against only one class of land occupiers within the state; and the court does not point out, directly or by inference, any relationship between cutting down weeds and being a railroad-corporation-occupant of lands upon which the same are growing. If the Indiana court had pointed out some reason for such division, some relevancy of the classification and the subject matter, some quality of occupancy distinguishing railroad corporations on the one hand from all other occupiers on the other, as respects cutting down noxious weeds, we should then be in position to analyze and make reply to what the court had said on that subject. But as it is absolutely silent upon the matter and has not pointed out any basis for the classification or given any reason why the line should be thus peculiarly drawn, we shall have to deal with the matter *de novo* by showing positively that it is not a proper classification with respect to cutting down weeds, to divide occupants of land as the Act in question does.

The classification of the sort here attempted makes a distinction between land occupiers, based upon the character of the business carried on, *i. e.*, railroad transportation, and the corporate character of the occupant. If there is any proper basis for this classification, that basis must be found in *some inherent difference in the character of the occupancy by railroad corporations.*

What reason is there for requiring the cutting down and destruction of these weeds upon lands occupied by railroad corporations and not on others? The only possible basis for such a distinction would be, that lands occupied by railroad corporations were particularly inclined and to a greater extent than other lands, to produce thistles, burrs, docks and other noxious weeds. If such were actually the fact, it might be a valid basis for requiring the occupant whose lands were especially prone to produce the evil condition aimed at, to remove it. We think it hardly necessary to argue that the basis in fact for such classification is wanting. No reason is perceived why lands occupied by railroad corporations should be especially prolific in producing these weeds and in greater number, than the lands occupied by any individual. The statute in question is a positive and direct discrimination between persons engaged in the same act, namely, in the act of occupying real estate, and the distinction is based simply upon the character of the occupant, and that character has not in the remotest degree anything to do with the subject of weeds. It is difficult to see why it is not equally a denial of the equal protection of the laws to classify occupiers of land, in respect of the duty of cutting down weeds, with reference to whether they are railroad corporations or not. In *Connolly* v. *Union Sewer Pipe Co., supra,* where the provisions of an Illinois anti-trust act were withheld by the statute from applying to agricultural products or livestock while in the hands of the producer or raiser, the court, after referring to the exemption of farmers and livestock raisers, and the privilege they had to do that which, if done by others, would be a crime against the state, continued:

> "The statute so provides, notwithstanding persons engaged in trade or in the sale of merchandise

> and commodities, within the limits of a state, and agriculturists and raisers of livestock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right open to all, subject to such regulations, applicable alike to all in like conditions, as the state may legally prescribe."

So here likewise a railroad corporation is in the same general class with all other occupants of real estate as respects the subject matter of cutting down weeds thereon. It may be true that with reference to other features of occupancy by railroad corporations, a distinction as respects railroad corporations might be drawn. For example, upon lands occupied by them, and over which they run trains, they could doubtless be required to erect fences; that is because running heavy, high speed trains creates a condition with respect to the passengers and the public generally that would require the land, over which the trains are so operated, to be kept free from obstructions of various sorts by means of fences, and land so occupied by tracks for such trains would take on a peculiar character thereby. The condition is created by the business itself of the railway company. Concerning this feature of the railroad business, the court, in the *Ellis* case, *supra*, said:

> "That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the fourteenth amendment. * * * But this and all

> kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged,—a duty not resting upon others. * * * It is all done in the exercise of the police power of the state, and with a view to enforce just and reasonable police regulations."

Here, however, the railroad corporation is not pursued as such, nor with reference to its public duties, but merely as the occupant of certain land. The Act applies to a feature of railroad business, in which that business is not peculiar or unique, and in which it does not differ from the business of individuals, copartnerships or private corporations in any respect. A railroad corporation will occupy land in practically the same manner as an individual; it will transact its business thereon, and that land will be prolific or otherwise of noxious weeds absolutely to no greater or less extent than under an individual occupant. The tendency of the land to produce noxious weeds does not arise from any quality, condition or peculiarity of a railway company or of its business. Seed which falls upon the soil of land occupied by a railway company will germinate neither more nor less rapidly than the seed which falls on neighboring land occupied by an individual. The wind which blows the seeds about does not cause them to fall in any greater abundance upon land occupied by a railroad company; nor is land occupied by a railroad corporation thereby liable to produce weeds more noxious than the weeds on land otherwise occupied. We submit that all occupants of land as respect the subject matter of weeds are in a single class without any one occupant being in different circumstances in this respect from any other, and that therefore the rule laid down in *Missouri* v. *Lewis*, 101 U. S., 22, at page 31 applies, namely, "no person or class of persons shall be denied the same pro-

tection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

If the statute, in addition to the requirement that railroad corporations should cut down weeds on *all* lands occupied by them, should contain a provision that all other occupants should cut down weeds on *one-half* of the land occupied by the latter class, the inequality would then become more apparent and glaring, but it would really be less than the inequality which now exists. So too, if the statute required weeds to be cut on land occupied by every *corporation,* while the land occupied by individuals was exempt from this liability, the discrimination would be more conspicuously unjust in its appearance but less so in its reality. But the statutes of Indiana relating to the cutting of weeds go even further in their discrimination. Not only does the act in question allow the mechanic, the farmer, the professional man, banker or broker, lawfully to occupy land in any city, village or township of the state with free privilege to allow burrs, docks and other noxious weeds to grow thereon, with exemption from the duty to cut them down, and free from a penalty in case of default; but other statutes *make provision for payment* to the private individual for doing the very acts which the railway company is required to do without compensation and under penalty. An act of Indiana (Acts of 1897, page 122) requires all landowners, through or along whose land public highways are laid out, to cause all briar, thistles, burrs, docks and other noxious weeds growing along such contiguous highways to be cut down and destroyed between July 1st and August 20th. The person complying with this act is remunerated there-

for by the state at the rate of $1.25 per day, such amount to be credited upon his road taxes. If the landowner neglects or refuses to cut down the noxious weeds along the abutting highway, *there is no penalty* imposed therefor upon him; he simply loses the opportunity to pay his taxes by work instead of in money.

Further to illustrate the arbitrary classification of the act, take the following cases of what might readily occur. Under the act a corporation has from July 1st until August 20th in which to cut down the weeds and if the cutting down and destroying of such weeds is completed by the 20th there is no default, no matter how long a time elapses after the first day of July before the work begins.

1. The A railway company leases from B, an individual, a tract of land and the railway company occupies the same. Thistles, burrs, docks and other noxious weeds spring up on the land. The first day of July arrives. The company is under the burden to cut down these weeds and will be in default if it has not done so by August 20th. On August 15th the lease expires and the railway company gives up possession to B, the owner. The weeds will never have to be cut; B is under no default and the burrs, docks and other noxious weeds will naturally go to seed and that seed will be disseminated without liability on any one's part and will be spread upon adjacent lands with the same force and effect as though the railway company had remained in possession five days longer and had not cut them. Whether those weeds will ever be cut down and destroyed then is a matter wholly within B's discretion and volition, whereas if the railway company's lease had lasted five days longer it would have

been compelled to expend money in cutting down the weeds or be subjected to a penalty for its failure.

2. The A railway company owns and occupies a tract of land and the noxious weeds enumerated in the statute spring up and grow thereon. After July 1st the railway company does not cut them down. On August 15th it leases the land to B and B enters into possession. Under the law, any obligation existing with reference to cutting down and destroying the weeds has disappeared. The railway company was not in default when it went out of possession as it had still five days under the law in which to cut the weeds and before any penalties could accrue; B is not under any obligation to cut down and destroy them, because he is an individual and not a railroad corporation.

3. B owns and occupies land on which are growing the noxious weeds enumerated in the act. These weeds are growing thereon on July 1st and thereafter on August 15th B leases the land to the A railway company and the latter enters into immediate possession and occupies the land. With respect to these weeds, there was no obligation whatever to cut them down and destroy them, resting upon any one. The railway company by virtue of its taking possession as an occupant of the land on August 15th is immediately subject to the obligation to cut down and destroy these weeds, which prior thereto have been lawfully growing and luxuriantly vegetating on the land.

4. The A railway company leases land to B, who is in possession as tenant on July 1st. Noxious weeds are growing on this land. The lease expires on August 15th, and with it expires also the immunity of the weeds. For now the railway company must cause them to be cut down and destroyed, whereas had the term of B's

lease continued 5 days longer, the weeds would never have had to be cut down by anyone whatsoever, and the railway company would have been as free and immune from the expense thereof as B had been during his tenancy.

In the above cases B is described as an individual, but with equal accuracy B may be taken to be a firm, association or corporation of any kind whatsoever, except a railroad corporation.

The classification is not a reasonable and legal one and rests upon no sound or proper basis; the law does not embrace all the class to which it naturally is related, for it is naturally related to all occupants of land. If the state legislature tries to exterminate thistles, burrs, docks and other noxious weeds, it must obviously require them to be stamped out on *all lands* whatsoever regardless of who might occupy them; otherwise the exempted land will become a constant source of pollution and render nugatory the action of those who are required to destroy such weeds. An analogous case might be found in a quarantine regulation which requires that persons suffering from an infectious disease should be quarantined, but excepting from the provisions thereof certain persons. If the excepted persons should catch the disease along with persons upon whom the act operated, the law would not stand any chance of preventing an epidemic. For this reason we say that the act in dispute does not embrace all of the class to which it is naturally related; that it creates a preference and establishes an inequality among persons all of whom are equally meritorious, and that it applies to land occupants of a certain character and excludes from its effect other land occupants who are not dissimilar in respect to the subject-matter of the act.

The M. K. & T. Ry. v. *May Case* (194 U. S., 267):

In this case a Texas statute which imposed a penalty upon railway companies in favor of contiguous landowners for permitting Johnson grass to mature and go to seed upon its right of way was upheld. We do not believe, notwithstanding an apparent similarity between the Texas statute and the present one, that the above case militates against our contentions or sustains the classification made by the Indiana statute.

The Texas statute is not set out in terms, but the nature thereof may be gathered from the following extract from the opinion:

> "This is an action to recover a penalty of $25, brought by the owner of a farm contiguous to the railroad of the plaintiff in error, on the ground that the latter has allowed Johnson grass to mature and to go to seed upon its road. The penalty is given to contiguous owners by a Texas statute of 1901, Chap. 117, directed solely against railroad companies for permitting such grass or Russian thistle to go to seed upon their right of way, subject, however, to the condition that the plaintiff has not done the same thing. The case is brought here on the ground that the statute is contrary to the 14th Amendment of the Constitution of the United States."

The following differences between the two statutes are apparent:

(1) The Texas statute gave the penalty to *contiguous landowners;* the Indiana statute gives it to "any person feeling himself aggrieved." This distinction is one bearing upon the question of due process of law, and is noted elsewhere herein.

(2) The Texas statute required the contiguous landowner to be free from having done the same thing; the Indiana act does not.

(3) The Texas statute was limited in its operation to the railway company's right of way; whereas the Indiana act applies to *all lands* occupied by the railway company "in any city, village or township."

Taking (2) and (3) in order: (2) The Indiana statute is obviously less fair in its lack of any requirement of weed cutting on the adjacent landowner's part. This is so for a number of reasons. Such requirement *ipso facto* removes almost all the inequality apparent on the face of the statute. The adjacent landowner is, in effect, required to measure up to the standard imposed upon railroad companies, for otherwise he cannot collect the penalty. If he does not cut weeds, then neither he nor the company has to pay or do anything. They are on an equality. But in Indiana an adjoining landowner who has allowed noxious weeds to grow over his land, is fully eligible to "feel aggrieved" and to collect the $25 penalty. This disparity alone, we submit, presents a case where "the rudiments of fair play required by the 14th Amendment are wanting." And such is the exact case found here. The cross-examination of the defendant in error revealed the following (Tr., p. 19):

> "Q. You didn't see any burrs or dock or thistle on the right of way of the defendant's railroad in the month of July and up to the 20th of August, 1911, did you?
> A. I don't know that I did.
> Q. Were there any burrs or dock or thistle on your farm in 1910?
> A. I think there was.
> Q. In the year 1909?
> A. I reckon there was. I don't recollect the years.
> Q. In 1908?
> A. I don't recollect."

There is no justice or fairness in such a situation. The defendant in error could not have secured this judgment under the Texas act. Moreover, in Indiana, the penalty is collectible by one from whose land the weeds may have spread to the right of way in spite

of diligent efforts on the railway company's part to keep the land clear on its side of the fence. Indeed, the more lax and shiftless the adjoining landowner is in this respect, the better chance he has of creating a condition whereby he can assuage his grieved feelings by mulcting the railway company of $25.

It is difficult to assume that the noxious weeds on the land of the defendant in error, to whose existence he testified, were the progenitors of the weeds on plaintiff in error's right of way and that the latter sprung from those growing on defendant in error's farm; it would be equally difficult to assume that the weeds growing on his farm descended from those growing on plaintiff in error's right of way. The most natural assumption is that the wind which scattered the seeds in the first place, distributed them alike over the lands of both of the parties hereto. The weeds were equally a nuisance on either side of the fence. The legislature has granted them complete immunity on one side. The situation shows emphatically the absurdity of the distinction created by the legislature between lands occupied by a corporate entity engaged in transportation by railroad and lands occupied by any other person, firm or corporation, with respect to weeds growing thereon.

(3) The support for the classification made by the Texas statute was found by this court as follows:

> "But it may have been found, for all that we know, that the seed of Johnson grass is dropped from the cars in such quantities as to cause special trouble. It may be that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish. and that whereas self interest leads the owners of farms to keep down pests, the railroad companies have done nothing in a matter which concerns their neighbors only."

The above, according to Mr. Justice Brown, dissent-

ing, was "the only distinction suggested in support of the ordinance"; and he added that "there is not only no evidence of such fact, but it is highly improbable that the seed of a noxious grass of this kind would be carried upon the cars at all."

The actual situation here throws an interesting light upon the statement of the court, *supra,* that "self-interest leads the owners of farms to keep down pests." Whether or not there is that uniform relief to be expected from land occupiers, other than railroad corporations, with respect to cutting down weeds, is a matter not to be tested by *a priori* speculation but by the actual facts, and those facts so far as the defendant in error is concerned, are found in this record, and set out *ante.*

But even if the basis of the argument in the *May* case is sound as respects the farmer, it will not apply here, because the Indiana act applies to *all* the land occupied by railway companies. The land in cities and villages being specifically included. The statute applies to city lots as well as to land in the rural districts. What peculiar or additional incentive has the occupant of a city lot to cut the noxious weeds growing thereon? How does their presence seriously affect him? Such land is certainly not the same as that used for tillage. In practically every city and town through which it passes, a railroad has land outside of its right of way strip; for example, for maintaining roundhouses, shops, yards, repair tracks, turntables and other buildings and structures used in connection with its business. Take, for example, land occupied by railroad shops; in no respect are these shops in any manner different from the property of a private manufacturing establishment. It is no uncommon thing to see noxious weeds growing around

the outlying real estate occupied by factory buildings. And in the poorer sections of cities and towns, it is a matter of common observation that the occupants of premises allow weeds to grow in profusion. It is indeed impossible to set forth in full the number of places where noxious weeds may be expected to grow, and do grow, where there is no incentive at all on the part of the occupant of the real estate to cut them down. Take even the case of the farmers, this court must know judicially that there are pieces of waste land, unfarmed tracts and timber tracts scattered throughout the farming regions of every state. A farmer may be interested in keeping down weeds as to that land which he cultivates, but there is no such incentive with respect to the tracts above mentioned.

Moreover, the Texas statute operated with reference to *ownership* of the land. But one of the distinctions in the Indiana act is between that land which is *occupied* and which is *unoccupied*. The unoccupied land does not have to be cleared of noxious weeds at all, and this would be true even if the statute operated uniformly upon all land occupants of the state. Unenclosed waste land—which is the natural and most prolific breeding place for such weeds—is wholly exempted regardless of who the owner may be. A classification based upon occupancy instead of ownership, as respects cutting down weeds, is inherently illogical and arbitrary. Even if the interest of the farmer to cut down weeds existed, and were a compelling one, it would be so only with respect to those lands which were under cultivation. It certainly could not apply to unoccupied waste land.

But we submit that notwithstanding the decision in the *May* case, it is not proper for the legislature to exempt from the operation of the law those persons or cor-

porations who are assumed to have an incentive to keep down weeds and who, out of self-interest, can be intrusted to remove them. If it be true that self-interest of other land occupants to keep down noxious weeds might be relied upon to prevent their growth, this merely shows that if the law were made universal, it would be more readily obeyed by private land occupiers than by railroad corporation occupiers. That railway companies would be less given to the observance of the precautions required of them as such land occupants than would other land occupants, does not create a distinction in principle. It simply shows that if the law were made universal, railroad companies would be oftener prosecuted than other occupants. The operation of a statute should embrace all citizens alike. It may be that in a great many activities of life, many people can be intrusted to do things voluntarily without the aid of a compelling statute. The law, however, should know no distinction based upon the sense of personal interest or obligation. For one thing, circumstances may operate to hinder one of such persons from carrying out his good intention. An occupant of land may die and the title thereto may be involved in such litigation so as to prevent its being used by anyone. Many circumstances may arise which would prevent the best intentions from being executed. Certainly the constitutional guaranty, that all persons shall have the equal protection of the law, does not mean that persons may be specifically exempt from the operation of laws on the ground that they do not need compulsion to act in the same manner as other citizens are required to act. What would be said of a statute forbidding stealing, but which exempted therefrom certain eminently respectable persons on the ground that they were not prone to steal? Civil liberty, *i. e.*, liberty under the law, means nothing except that

barriers to hostile action have been set in favor of all classes from the highest to the lowest by laws and institutions, and that arbitrary and personal elements have been eliminated from the adjustment of interests and rights. The compulsion of law, under the constitution, should operate equally on all citizens whether they feel that compulsion or it. The act in question was passed in 1889. How could the legislature of Indiana know that, for all time in the future, all other-than-railroad corporation land occupiers in the state would continue to live up to the high notion which the legislature of 1889 entertained of them, and therefore might be safely exempted? The defendant in error, at any rate, has failed, according to his own testimony, to maintain that exalted position.

We desire to add a single further observation with respect to classification. It may be urged that although the distinction, which might validly be made under the doctrine of the *May* case between right of way and adjacent farm lands, does not exist as to lands in cities and villages, yet the plaintiff in error's land, with respect to which the penalty in this case was assessed, is not within the class of land with reference to which the act might be adjudged repugnant to the 14th Amendment; see, for example, *M. K. & T. Ry. Co.* v. *Cade*, 233 U. S., 642, 648. The present case does not fall within the limits of that doctrine, however. If the statute were ambiguous or did not state in detail to what lands of the railway company it should apply, then doubtless it should be construed to apply only to those which the legislature could validly include; but the act says specifically,

> "lands occupied by them in any city, village or township of this state."

The same principle of construction applies with ref-

erence to wills. Where a provision is susceptible of two interpretations, one of which would render the will invalid and the other valid, the latter construction will be adopted. But a court cannot strike out or add a word to any clause of a will in order to save it. In this case the court would have to alter the substantial wording of the above quoted clause of the statute in order to make it apply as narrowly as the Texas statute did in terms. This court faced this same argument in the first Employers' Liability Cases, *Howard* v. *I. C. R. R. Co.*, 207 U. S., 463. It was there argued that the act, although using the words "any employe" should be interpreted as being exclusively applicable to "any interstate employe." The court said:

> "But this would require us to write into the statute words of limitation and restriction not found in it. * * * Of course if it can be lawfully done our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose."

And in *I. C. R. R. Co.* v. *McKendree*, 203 U. S., 514, this court said with respect to a quarantine order promulgated by the Secretary of Agriculture which, by its terms, was a regulation, which included intrastate commerce.

> "Nor have we the power to so limit the secretary's order as to make it apply only to interstate commerce, which it is urged *is all that is here involved.* For aught that appears upon the face of the order, the secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single and indivisible."

And in *United States* v. *Reese*, 92 U. S., 214, 221, the court said, upon this general subject:

> "We are, therefore, directly called upon to de-

> cide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only."

The court declined to make such limitation.

In consequence of the above principles, there is no legal significance in the fact that defendant in error in this case was an adjoining landowner and farmer, and that the land of the plaintiff in error, covered by the weeds in question, was its right of way. All these facts have no significance, for the reason that there is no such requirement contained in the statute. The legislature has said "lands in any city, village or township," and having thus drawn the line, this court must take the statute as it finds it.

Point II.

(Denial of due process of Law—Assignments of Error, Nos. 1, 3 and 4.)

A STATUTE IMPOSING A PENALTY UPON A RAILWAY CORPORATION BY FAILURE TO CUT WEEDS ON LANDS OCCUPIED BY IT, IN FAVOR OF "ANY PERSON FEELING HIMSELF AGGRIEVED," BUT WHO HAS SUFFERED NO DAMAGE AS A RESULT OF SUCH FAILURE, DEPRIVES SUCH RAILWAY CORPORATION OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW AND WITHOUT COMPENSATION, IN VIOLATION OF AMENDMENT 14 TO THE FEDERAL CONSTITUTION.

The Indiana Supreme Court disposes of this question in the following language, which is all that is said in the opinion on the subject (Tr., pp. 36, 37):

> "It is contended further that as there are no averments of any actual damages sustained by appellee that the complaint is insufficient. This was not necessary. * * *
>
> The penalty imposed is for violation of a duty required of appellant, and it is not in a position to complain that the penalty when collected shall be paid to the complaining party, and this is not available in defense of an action for the recovery of the penalty prescribed. *Penn. Co.* v. *State*, 142 Ind., 428, 437; *Western Union Tel. Co.* v. *Ferguson*, 157 Ind., 37, 40, and cases cited."

The usual legal significance of the words "person aggrieved" is one who has suffered an invasion of a legal right. Webster defines "aggrieved," used as a legal term, "adversely affected in respect of legal rights; suffering from an infringement or denial of legal rights." The State Court, however, specifically decided that aggrieved had no such meaning here; that a plaintiff need

not allege that any of his legal rights had been infringed or denied.

As thus construed, the penalty may be imposed in favor of any person by reason of his aggrieved feelings alone. The plaintiff does not have to be, as under the Texas statute, *supra,* an adjoining landowner. He need not be a landowner or occupier at all; he may be an utter stranger to the locality where the suit is brought. He does not have to sustain any relation to the railway company, where even potential damages will result. He simply has to "*feel* aggrieved," and the statute thereupon takes $25 from the railway company and gives it to him, not because he sustained any actual or threatened damages, but because his feelings are hurt. How can the defendant test plaintiff's feelings, and meet such an allegation? As Brian, C. J., said (quoted by Lord Blackburn):

> "It is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is."

We unhesitatingly affirm that the statute takes the property of the railway company without due process of law, in thus bestowing it upon a plaintiff, not in satisfaction of any debt or obligation owing to him, but simply because he "feels" (*i. e.,* imagines) himself aggrieved.

The State Court sustained the statute upon the authority of two cases, *i. e., Pennsylvania Company* v. *State,* 142 Ind., 428, and *Western Union Telegraph Co.* v. *Ferguson,* 157 Ind., 37. Whether the two cases cited were correctly decided is a matter of no interest or consequence here. But the resemblance between those cases and the present is wholly specious and disappears upon any careful analysis. In both those cases the defend-

ants were, as this plaintiff in error is, engaged in a public calling; and in those cases the statutes involved regulated the conduct of the railway company and of the telegraph company in respect of the performance of their public duties. But here the statute regulates plaintiff in error not with respect to its public duty, but its private occupancy of land. In the *Pennsylvania Co.* case, the action was for the recovery of penalties for violating a statute which required railway companies to place a blackboard in passenger depots and to note thereon whether passenger trains were on schedule time, and if late, how much. Moreover, the cause of action under this statute was *in favor of the State of Indiana,* as appears from the following language used in the opinion of that case:

> "Very plainly we think the limitation insisted upon by the appellant does not apply where the cause of action, as in this case, is in favor of the State of Indiana."

Here then was a case where the legislature sought to regulate a common carrier in the performance of its duties to the public, and provided, in case of breach, for an action in favor of the state against the offending company. Certainly there is no denial of due process of law in such a situation. But the difference between that situation and the present case is apparent upon mere statement. In that case moreover, the state collected and kept the penalty, except that portion which it gave to the prosecuting attorney of the county. The Indiana court held that this division between the state and its officer "was intended as a method of compensating that officer." That is, the penalty there went to the state, just as a fine would have done had the statute been a criminal one, and the state got the money, except that part which it paid as compensation to the prosecuting

officer for work done on the state's behalf. In this case, the business of the plaintiff in error, which is affected by the public interest, is not being controlled by means of the statute in question. Plaintiff in error was not chartered for the purpose of cutting down weeds, nor has that act the slightest relation to its public duties which arise by virtue or its status as a common carrier, and the penalty was not imposed in order to insure the performance of any duty which plaintiff in error owes the public. It is pursued solely in its character of occupant of certain real estate. Likewise the penalty in this case is not imposed in favor of the State of Indiana. The action is one of *debt;* the state has nothing to do with the matter, and the person who receives the penalty does not do any work for the state in consideration of receiving the penalty.

In the *Western Union Telegraph Co.* case, the statute involved provided that telegraph companies should do certain acts so as to insure impartiality and equal treatment to all its patrons, and provided that any company violating the act.

> "Shall be liable to any party aggrieved in the penalty of $100 for each offense."

Here again the legislature is regulating a public service corporation and regulating it with respect to matters having to do with its public service functions. The primary duty of a telegraph company is to send the message of any member of the public, and to transmit the same impartially and without discrimination in service. If it does not do so it violates its common law duty and its statutory duty as well. Under this statute the penalty goes to the person *who is injured* by the breach of duty. The court held in this case that the "aggrieved party" specified in the statute was the person whose

message the telegraph company refused to receive or transmit in the manner prescribed. In other words, the penalty was in favor of a person actually, even though nominally, injured. The telegraph company owed a specific duty toward the person who was affected by its later misconduct. The court held specifically on this point:

> "A recovery cannot be had by an informer as such, but only by the party aggrieved by the breach of a *public duty owing to himself.*"

The court also said:

> "He (the sender) may recover compensation for actual damages independently of this statute which furnishes a cumulative remedy, and warrants the recovery of fixed punitive damage."

That is, if the telegraph company did not perform the public duty it owed to the sender of a message, the sender might recover his actual damages and the statute in addition gave a cumulative remedy and fixed the sum of $100 by way of *punitive damages.* The breach involved is a breach of contract as well as breach of public duty. Certainly there is no denial of due process of law involved in such a proceeding.

So likewise the legislature of Indiana has provided that a mortgagee upon having his mortgage satisfied must make an entry of satisfaction thereof upon the public records, and if he fail to do so, shall be liable for a specified penalty. Here is a contract relation between the mortgagee and the mortgagor, upon which relationship the legislature, with regard to public policy, has imposed certain duties in favor of the mortgagor. But the penalty is collectible only by the mortgagor. *Judy* v. *Thompson,* 156 Ind., 533.

In this case the plaintiff in error does not owe any duty, by private contract or public calling, to any

specific individual to cut weeds. Undoubtedly the legislature may provide that occupants of lands shall cut down noxious weeds, and provide a penalty for the breach thereof. But the duty to abide by the statute is not one which is owned to any specific individual. It is like the duty to obey any statute, such as statutes forbidding stealing and the like; that duty was owed to the state or to the body politic. The state may provide a penalty for breach of statutory duty in its own favor or in favor of an informer if it wishes to secure viligance in enforcing the law; or if the state has in mind a particular class of persons (such as the adjacent landowners involved in the *May* case) who have a real, existing interest which ought to be protected or benefited by the performance of the act required, then in favor of such persons.

But that is not the case here. The penalty does not go to the state, or to a person with whom there was a contract relationship arising out of public duty, or even a simple contract relationship. The statute, as interpreted by the State Court, allows *any person* to bring suit and to collect the penalty. It is the same as though, in the *Pennsylvania Co.* case, *any person* had been given the right to sue the railway for failure to mark up the time of trains on its blackboard. Or as if *any person* were allowed to sue the telegraph company because it failed properly to receive or transmit A's message. Or as though any person were allowed to sue X, a mortgagee, for failure to release of record a mortgage made and paid by Y. A plaintiff who was not a party to the transaction between A and the telegraph company, or a party to the mortgage transaction between X and Y, can have no interest in the matter of the discrimination against A, or of X's failure to release the mortgage; and

by what color of right can the legislature provide a cause of action in his favor, on account thereof, against the telegraph company or against X? That is in effect what the present statute does; Section 1 provides that the railway company must cut down the noxious weeds on lands occupied by it, and Section 2 allows it to be sued in an action of debt, for failure so to do, by any person whatsoever. May the legislature validly provide, when imposing a duty upon private citizens by general law, that in case of breach, the offending party shall be liable to pay money therefor to whoever cares to bring suit for it? If such a thing can be done with reference to cutting down weeds, it may be done with reference to all other duties which the legislature imposes upon citizens of the state. For example, the legislature can provide that if a property owner fails to pay his taxes he may be sued for the recovery of a penalty of $25 by anyone "feeling aggrieved." A plaintiff would not have to show any resulting damages to himself; he would simply have to allege that the defendant had not paid his taxes as provided by law and that the plaintiff "feels himself aggrieved" thereby, and to demand the sum of $25. But the taxpayer owes the duty to the state to pay his taxes—he does not owe that duty to B, C or D, private citizens; and a statute therefore which gives B, C and D $25 out of A's pocket, because A has not paid his taxes, certainly does take the landowner's property in a most indefensible and high-handed manner. Or the legislature might pass a law which prohibits stealing and which allows anyone whatsoever to sue the thief and recover a penalty of $25. The thief owed a duty under the criminal statute to refrain from stealing, but he does not owe this duty to any specific individuals. In all such examples, and in the present statute, the legislature has attempted to create a right of

action out of nothing and to bestow it upon persons at large. The legislature has created a right of action out of whole cloth in favor of a stranger. It allows him to recover a certain sum from another from whom no duty whatsoever was owing. It is simply a case of saying to the defendant, "You pay $25 to John Smith because you failed to mark up the arrival of your train; true, John Smith did not intend to become a passenger and had no interest in the time of arrival of the train." Or say to the telegraph company, "You failed to send A's message without discrimination and you must therefore pay $100 to John Smith by reason thereof in case he sues you for it, even though A may be quite indifferent about the matter and not care to bring any action." We unhesitatingly assert that the legislature cannot do this; that it has no power to bestow what might be termed a "floating" cause of action upon persons at large against other citizens for breaches of duty by the latter which the legislature has imposed upon them.

What is here said does not imply that the legislature could not, as was done in the Texas statute, give a cause of action in favor of the adjacent landowner. The adjacent landowner sustains at least some relation—that of a neighbor—to the railway company. He is in position to be injured, potentially at least, by the presence of noxious weeds, and such statute is for his special protection. The legislature intended the act of cutting weeds to be performed for his special benefit and it may impose a penalty in his favor. This is the old and familiar rule, that when a statute requires an act to be done by any person *for the benefit of another,* and an injury is sustained by the one intended to be protected by reason of the violation of such statutory duty, an action lies in favor of the latter against the former for

the neglect to perform such duty, the action being either for a penalty or for actual damages; see *Atkinson* v. *Newcastle Waterworks Co.* (1887), 2 Exch. Div., 441; *Hayes* v. *Michigan Central R. R. Co.*, 111 U. S., 228, 239; *Willy* v. *Mulledy*, 78 N. Y., 310. But here the Indiana legislature had no intention to benefit any particular persons by virtue of this statute for such persons are not able to be defined in any manner whatsoever. A person owning or occupying not a foot of land may sue for and recover the penalty; a passenger riding by a patch of noxious weeds growing on the right of way, may get off at the next station and enter suit. The statute does not define any person or class for whose benefit it may be said to have been enacted. The state here has attempted to create what might be termed rights of action at large in favor of no one in particular and anyone in general. The statute is the same as though, in case it were extended to *all land occupants in Indiana*, it should subject every occupant in the state to the penalty in favor of any person feeling himself aggrieved; that is, the offending party should be liable in a civil action to whoever cares to bring suit. Such a case is exactly like the present, except that it brings out somewhat clearer the fact that the defendant in that case might be an individual instead of a railroad corporation.

Such we believe is a radical distinction between this statute and those relied upon by the Supreme Court of Indiana. There is an additional vice in the present statute. It is this: When a railroad company fails to mark up the time of arrival of a late train, and the State of Indiana sues and recovers $25; when the person whose telegram is not sent as required by the Telegraph Act, sues and recovers therefore the $100 penalty; when the mortgagor sues his paid mortgagee who has

refused to enter satisfaction;—in all such cases, there is an end of the matter. There can in each case be but *one penalty for one offense,* for where the law gives the penalty in favor of the person or persons injured there can be but a single recovery in the very nature of things; and likewise, if the penalty is given to an informer. But obviously such is not the case here under the present statute. The corporation is in terms made liable to "*any person* feeling himself aggrieved." The words "any person" mean an indefinite number of persons taken distributively, that is, one at a time. And where a particular description is annexed, it means each person out of an indefinite number of persons, who fulfills the description. For example, if a railway company announce that "any person possessing a ticket may ride"; such statement obviously means that any and all persons who are possessors of tickets may ride, and not merely the first such person presenting himself. So here, the declaration by the legislature that "any person feeling himself aggrieved" may sue, means that any and all persons who possess aggrieved feelings may sue, and not merely the first such person who gets his complaint on file. The meaning would be unquestionable if the legislature had provided that, for failure to cut weeds, suit might be brought "by any person sustaining damage from such failure." If the failure resulted in damage to the separate farms of A, B and C, respectively, could it be said that the above language would not give each a right to sue for his individual damage? It would be naturally supposed that the legislature would intend that each one be made whole, and its language would be apt for that object. Is the right of action any less inclusive of A, B and C simply because the legislature has made a different requirement from "sustaining dam-

age" and has substituted "feeling himself aggrieved"? Certainly the expression would still mean that each person, affected in the manner set forth by the statute, shall have his action. The change in the manner of being affected, from "sustaining damage" to "feeling aggrieved" does not change the scope of the persons to whom the act may apply.

The description in the act of the person entitled to sue does not inherently limit it to one such person, as in the above cases, where it is the state, or the person sending a telegram, or the mortgagor alone, who may sue. If A "feels himself aggrieved" there is no reason why B cannot at the same time feel himself aggrieved also; and likewise why C, D and E, etc., to an indefinite number of persons, cannot. A thousand persons "may feel themselves aggrieved" by the same patch of weeds. No one's "feelings" impinge upon or detract in the slightest from the strength or volume of anyone else's feelings with respect to plaintiff in error's failure to cut down weeds. If A sues for and recovers the penalty, this cannot be a bar to a similar suit by B, because the satisfaction of A's feelings by paying him $25 cannot by any possibility satisfy B's aggrieved feelings which are in nowise dependent upon or related in any manner to A's feelings. And similarly it is with respect to any one of a thousand other individuals who care to sue. How could the railway company plead in a suit by B, alleging that his feelings were aggrieved, that it had paid A the sum of $25 for A's aggrieved feelings? B might well reply that he did not know A; was not concerned with him, and that his (B's) aggrieved feelings did not depend in any way upon A's. Or suppose separate suits are concurrently filed by A, B, C, D, etc., the defendant cannot put in a plea of payment to any of these suits, because it has

paid nothing as yet; nor could it plead in abatement, because the suits are distinct and separate.

We think that the above makes it plain that this statute means exactly what its terms import, and that *any person* feeling himself aggrieved may recover, notwithstanding that others have felt themselves aggrieved and have recovered a similar penalty because of the same weeds which were not cut.

This court, in *Seaboard Air Line R. R. Co.* v. *Seegers*, 207 U. S., 73, said:

> "We know there are limits beyond which penalties may not go even in cases where classification is legitimate."

Is there any difference between imposing a single penalty of $2,500 and permitting 100 persons to collect a penalty of $25 each? The fact that the record here does not show that any other person beside defendant in error has brought suit, is immaterial. To decide otherwise would be to alter the act so as to restrict it to the first (or second, or third?) suit brought, and that would be to alter the statute as it stands. But without alteration it is clearly bad, because the first dollar of an unreasonable penalty violates the constitutional provision as much as the last dollar; and so where an indefinite number of persons are allowed to sue for a separate penalty, the first action violates the defendant's constitutional immunity as much as the last.

Conclusion.

The statute herein involved is plainly bad for the reasons heretofore abundantly given, to which reasons, we may add, the Indiana court has not paid the slightest attention in its opinion. Of course that court was not bound to give reasons for its decision. That opinion

wholly ignores the question of the principles underlying any proper classification; it did not attempt to say a word in behalf of the artificial and indefensible classification contained in the statute. Nor did it say a word in defense of those provisions which give a right of action to any person "feeling himself aggrieved," except simply to make reference to cases which are plainly distinguishable.

We submit that the statute in question is clearly and plainly invalid, and respectfully pray that the judgment of the Supreme Court of the State of Indiana be in all things reversed.

Respectfully submitted.

J. C. Hutchins,
Wm. F. Peter,
Attorneys for Plaintiff in Error.

